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No.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

GLORIA WOLKENSTEIN, KATHRYN SILKES, PHILIP RUMORE and VINCENT NOLA, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
PETITIONERS,
v.
EUGENE T. REVILLE, INDIVIDUALLY AND AS SUPERINTENDENT OF SCHOOLS; CLAUDE D. CLAPP, INDIVIDUALLY AND AS CHIEF FISCAL OFFICER OF THE CITY OF BUFFALO PUBLIC SCHOOL SYSTEM; FLORENCE E. BAUGH; DAVID KELLY; JOSEPH E. MURPHY; LOUIS C. BENTON; JOSEPH D. HILLERY; MOZELLA RICHARDSON; DENNIS BULERA; OSCAR SMUCKLER AND JOHN C. FIORELLA, INDIVIDUALLY AND AS MEMBERS OF THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF BUFFALO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the procedures for determining if a public employee participated in a strike in violation of §210.1 of the Civil Service Law of the State of New York deprives petitioners of property without due process of law.

2. Whether the class of petitioners certified as "all persons who were penalized by defendants acting pursuant to Civil Service Law §210, owing to their involvement in a teachers' strike that occurred in Buffalo, between September 7 and September 24, 1976" was proper.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No.

GLORIA WOLKENSTEIN, ET AL.,
PETITIONERS

v.

EUGENE T. REVILLE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Deborah Watarz, Esq., on behalf of the named petitioners, and the class thereof, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, infra, 1A-19A, is reported at ___F.2d___. The opinion of the District Court (App. A, infra, 20A-51A, is reported at 539 F.Supp. 87 (1982).

JURISDICTION

The judgment of the Court of Appeals (App. A, infra, 52A) was entered on November 18, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall...be deprived of life, liberty, or property, without due process of law...

2. The Fourteenth Amendment to the United States Constitution provides in relevant part:

> ...nor shall any State deprive any person of life, liberty, or property, without due process of law;...

3. The statutes involved are set forth in Appendix B, pages 1B - 19B. They are:

42 U.S.C. 1983;
§201, Civil Service Law of the State of New York;
§210, Civil Service Law of the State of New York;
§2566, Education Law of the State of New York;
§7801, Civil Practice Law and Rules, State of New York;
§7803, Civil Practice Law and Rules, State of New York;
§3020-a, Education Law of the State of New York

STATEMENT

The named petitioners, and the class they represent, are all teachers employed by the public school system in Buffalo, New York. The class members were involved in a teachers' strike that occurred between September 7 and September 24, 1976. Petitioners seek a declaration that the procedures for determining if a public employee participated in a strike, in violation of §210.1 of the Civil Service Law of New York (commonly referred to as the Taylor Law) are unconstitutional in depriving them of property without due process of law. Under the provisions of the Taylor Law, once a public employee is determined to have participated in a strike, the employee loses the pay for that day(s) and additionally is subjected to a penalty equal to an additional day(s)

pay.

Pursuant to §210.2(d) of the Taylor Law, the superintendent of schools, as chief executive officer of the school district, is responsible for determining if a strike has occurred and which employees participated therein. Upon such determination, the superintendent notifies the employee and the chief fiscal officer of the district thereof, pursuant to §210.2(e). Thereafter, pursuant to §210.2(g), the chief fiscal officer must deduct from the wages of the identified employees an amount equal to twice the daily rate of pay for each day of the strike. This deduction must occur between thirty and ninety days from the superintendent's initial strike determination.

An employee determined by the superintendent to have participated in a

strike may file with the superintendent his objection to the determination, by means of an affidavit and supporting proof. Thereupon, the superintendent, without affording the employee an opportunity for a hearing, may summarily dismiss or sustain the objection. If, in the superintendent's opinion, the objection raises a question of fact, the superintendent appoints a hearing officer to hear and determine the matter.

The determination of the superintendent is reviewable pursuant to Article 78 of the Civil Practice Law and Rules of New York. (§§7801, 7803). Such review is limited and is not a de novo consideration.

Between September 7 and September 24, 1976, a strike was determined to have occurred affecting the Buffalo school system. Approximately 3000 teachers

were determined to have participated therein by the superintendent, Reville. Notices of his initial determination were given to the members of the class of petitioners on or about October 14, 1976. Approximately 400 class members filed objections to this determination, and of these, approximately 330, including those objections of the named petitioners, were summarily dismissed by the superintendent. Each member of the class then suffered the penalties proscribed by the section. These deductions totalled approximately six million dollars, consisting of approximately three million dollars in wages for the days of the strike, and three million dollars in penalties.

Action was commenced in the United States District Court for the Western District of New York alleging that the

strike determinations of §210 of the Taylor Law are unconstitutional in that it deprives public employees in New York, and specifically the petitioners, of property without due process of law, in that the superintendent, as chief executive officer, is not impartial or neutral, in the making of his initial strike determination, since he is also charged with the financial responsibilities of the district. He is, or may be, influenced in his determination of whether a strike occurred, who participated therein, and the resultant penalties. Petitioners contended that the possibility of bias results from the multi-faceted and inconsistent roles placed on the superintendent, as chief executive officer of a city school district. (§2566, Education Law).

Certain facts were stipulated to

between the parties. In relevant part, these were:

1. "petitioners" are employed as teachers in the Buffalo Public School System;

2. "petitioners" are public employees and the school system is a public employer, as the terms are defined in the Taylor Law;

3. the respondent, Reville, is the "chief executive officer" of the school district, the respondent Clapp, is the "chief fiscal officer" of the school district, as the terms are used in the Taylor Law;

4. the remaining named respondents comprised the members of the elected Board of Education of the district;

5. the claims of the named "petitioners" are typical of the claims of the class of "petitioners" and the named

"petitioners" will fairly and adequately protect the interests of the class. A class action is superior to all other available means of fair and efficient adjudication of the matter;

6. Questions of law and fact common to the class predominate over any questions affecting individual members thereof;

7. §210.2 of the Taylor Law is the section, the constitutionality of which is challenged;

8. the procedures contained in said section are to determine if a public employee violated the no-strike provision of the Taylor Law;

9. approximately 3000 teachers employed by the school district engaged in what was determined to be strike activity between September 7 and September 24, 1976.

10. On or about October 14, 1976, Reville determined a strike had occurred and that the class of "petitioners" had participated therein;

11. The class of "petitioners" were so informed and advised of the penalties therefor;

12. The named "petitioners" filed objections to the determination with respondent, Reville, and or or about December 3, 1976 received notice that the said respondent had summarily dismissed the objections;

13. Approximately 400 teachers filed objections to respondent's strike determinations and of that number, approximately 325 were denied a hearing and were summarily dismissed;

14. Respondent, Clapp, as chief fiscal officer, caused to be deducted from the wages of the class of

"petitioners" amounts equal to two days pay for each day of strike participation.

15. The deductions totalled approximately six million dollars, which sum was returned by the district and used by it towards its operating budget and expenses;

16. Pursuant to their statutory duties under the Education Law of New York, the respondents, Reville and Clapp, were involved in the formation of the district budget, and the planning and utilization of the six million dollars.

Upon this stipulation, and the papers, "petitioners" moved for certification of the class and summary judgment. The District Court granted class certification, denied "petitioners" summary judgment and granted such in favor of

respondents (App. 51A)

On appeal, the Second Circuit affirmed, holding that the presumption of unbiasness occasioned on administrators serving as adjudicators was not overcome by "petitioners" and that "petitioners" had not demonstrated a violation of their constitutional rights. The Court noted that petitioners claim was rejected by the District Court...not without evident misgivings..., (App. 3A).

It determined the precise issue as whether "...in authorizing Superintendent Reville to pass on the legal sufficiency of objections, §210.2(h) transgresses the command, rooted in common law practice...and considered to be inherent in the due process clause of the Fourteenth Amendment...that no person shall be judge in a case in the

outcome of which he has an interest."

REASONS FOR GRANTING THE PETITION

The case presents both an important question of federal law which has not been settled by this Court and the federal question was decided by the Court of Appeals in a conflicting manner with previous decisions of this Court. The Court of Appeals, in its affirmance, held that the combination of administrative, investigatory, financial and adjudicatory responsibilities, found in respondent, Reville, did not create a possibility of bias sufficient to affect his initial strike determination or his summary rejection of any objections filed thereto.

Petitioners readily conceed that various aspects of the Taylor Law have been previously challenged unsuccessfully,

e.g. Sanford vs. Rockefeller, 32 N.Y.2d 788, vac. and rem. 4160577, aff'd. 35 N.Y.2d 547, appeal dismissed 421 U.S. 973 (1975). However, the precise neutrality objection to the Taylor Law, as raised herein, has not been ruled on. Previous decisions of this Court, delineating the command that "no person shall be judge in a case in the outcome of which he has an interest" were stated by the Court of Appeals not to be conclusive on this precise question.

In Tumey vs. Ohio, 273 U.S. 519 (1927) and Ward vs. Village of Monroeville, 409 U.S. 57 (1972), both criminal cases involving "Mayors Courts" in Ohio, the state statutes involved were held to violate due process; in Tumey, on two grounds. First, the mayor "as an individual" had a "direct, personal, pecuniary interest" in the costs which

he received from convictions (273 U.S. at p. 523, 531-5) and because the mayor, as chief executive, had a strong "official motive to convict and to graduate the fine to help the financial needs of the village" (273 U.S. at p. 535). Ward was found to fall within this latter ground.

In Hortonville Joint School District No. 1 vs. Hortonville Educational Association, 426 U.S. 482 (1976) and Marshall vs. Jerrico, Inc., 446 U.S. 238 (1980), the challenged statutes withstood the attack on their constitutionality. However, the school board in Hortonville, was engaged in educational policy-making, not in adjudication of the striking teachers therein. And in Marshall, it was held that the "rigid requirements of Tumey and Ward, designed for officials performing

judicial or quasi-judicial functions" (446 U.S. at p. 248) were inapplicable to the administrators therein whose function was akin to a "prosecutor or civil plaintiff" rather than a judge. (446 U.S. at p. 247).

Thus, the situation presented in this case falls between the previous decisions of this Court, somewhere on the continuum established by the Tumey and Ward cases at one end, and the Hortonville and Marshall cases at the other.

Dugan vs. Ohio, 277 U.S. 61 (1928) presented a situation which fell within the later established continuum and which was relied on by the Court of Appeals. The differences between Dugan and the present case are apparent. Respondent, Reville, pursuant to §2566 of the Education Law, as chief executive

officer, was responsible for the finances of the school district, and juggled his many hats during the period of the strike and the determinations made by him in connection therewith.

The precise question raised by this petition, whether the strike determinations made by a superintendent of a city school district under the terms of the Taylor Law, violate public employees' due process rights, given the combination of responsibilities vested in the superintendent, has not been ruled on, other than in this case. Since a neutral tribunal is fundamental to the notion of due process (Ward vs. Village of Monroeville, supra; Tumey vs. Ohio, supra; In re Murchison, 349 U.S. 133 (1955), and since §210 of the Taylor Law fails to assure such an impartial

tribunal, in that the multitide of responsibilities placed on the respondent, as superintendent augers for a potential of bias, petitioners' due process rights have been violated. The constitutional shortcomings of Murchison, Ward and Tumey exist in the Taylor Law procedures attacked herein. See also: Gibson vs. Berryhill, 411 U.S. 564 (1973).

The monies garnered by the district as a result of the superintendent's strike decisions facilitated his fulfilling his budgetary and financial responsibilities. The existence of the possibility of influence on his Taylor Law determinations deprived petitioners of their right of due process.

Although the respondent's strike determinations were reviewable by means of an "Article 78" proceeding, pursuant

to New York's Civil Practice Law and Rules, such review is not de novo, as succinctly noted by the District Court, but will lead to affirmance if not arbitrary or capricious, an "exacting standard that can cover a multitude of misdeterminations". (App. 35A). Such review also fails to insure an impartial tribunal in the first instance. (c.f. Marshall vs. Jerrico, Inc., supra).

Although this Court upheld the dismissal of striking teachers in Hortonville (supra), important factual differences exist between it and the present case. Under the challenged §210 procedures, the superintendent, not the elected school board members, serves as the adjudicator. Also, under New York law, striking teachers cannot be dismissed by their Board of Education. Only as a result of charges

placed against a tenured teacher pursuant to §3020-a of the Education Law (App. 17B) can such a teacher be disciplined. Section 3020-a sets forth the procedure for such disciplinary action, culminating in a binding decision by a three-member panel, after a complete, due process hearing. In Hortonville, the applicable Wisconsin law provided for the elected Board members to make this determination. Thus, the §210 procedures are akin to rendering financial penalties for the benefit of the school district (or other public employer), rather than making decisions concerning educational policy and the educational process.

Also, the decision to discharge the teachers was attacked in Hortonville, the constitutionality of the Wisconsin statute was not challenged. Here, the

issue is whether the strike determination procedures of §210 afford public employees in New York their due process rights, especially given the conflicting roles served by the respondent, superintendent, which led to the strike and his determinations (i.e. general supervision of teacher conduct, budgetary and financial, involvement in the failed collective bargaining process which led to the strike determinations).

The judicial, or quasi-judicial role of the superintendent brings the present case under the Tumey and Ward doctrines, rather than Marshall vs. Jerrico, Inc. (supra). The factors present in Marshall upon which the finding of constitutionality was based, are not present herein. In Marshall, the public official performed no judicial or quasi-judicial role, but

was more akin to a prosecutor. Under the challenged procedures herein, the chief executive officer acts as prosecutor and judge. In Marshall, full de novo review was statutorily provided for. Here, there is none. In Marshall, the amount of penalties assessed compared to the overall Employment Standards Administration (ESA), was insignificant. Here the amount of penalties bears a significant relationship to the overall budget of the district (App. 45A - 47A).

In sum, petitioners contend the Court of Appeals put this case on the wrong portion of the continuum established by the decisions of this Court in Tumey, Ward, Dugan, Hortonville, and Marshall. The succinct issue raised, whether the strike determination procedures deprive petitioners of their

due process rights has not been answered other than herein. Those challenged procedures fail to insure a neutral tribunal, and fail to insure petitioners a proceeding wherein their position may be advanced to an adjudicator not potentially predisposed to find against them.

CONCLUSION

For the reasons stated herein, it is respectfully requested that the petition for a writ of certiorari be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 51—August Term, 1982

(Argued September 16, 1982

Decided November 18, 1982)

Docket No. 82-7173

GLORIA WOLKENSTEIN, KATHRYN SILKES, PHILIP RUMORE and VINCENT NOLA, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

—v.—

EUGENE T. REVILLE, individually and as Superintendent of Schools; CLAUDE D. CLAPP, individually and as Chief Fiscal Officer of the City of Buffalo Public School System; FLORENCE E. BAUGH; DAVID KELLY; JOSPEH E. MURPHY; LOUIS C. BENTON; JOSEPH D. HILLERY; MOZELLA RICHARDSON; DENNIS BULERA; OSCAR SMUCKLER; JOHN C. FIORELLA; as members of the Board of Education of the City School District of the City of Buffalo,

Defendants-Appellees.

Before:

FEINBERG, *Chief Judge*,
and FRIENDLY and KAUFMAN, *Circuit Judges*.

Appeal by plaintiffs from an order of the District Court for the Western District of New York, John T. Elfvin, *Judge*, 539 F.Supp. 87 (1982), granting defendants' motion for summary judgment in an action in which plaintiffs challenged the constitutionality of § 210.2 of the New York Civil Service Law (the Taylor Law). Affirmed.

BRUCE FENWICK, Buffalo, NY (Robert D. Clearfield, General Counsel, New York Educators Association), *for Plaintiffs-Appellants*.

WILLIAM E. CAREY, Assistant Corporation Counsel, Buffalo, NY (Joseph P. McNamara, Corporation Counsel of the City of Buffalo), *for Defendants-Appellees*.

ROBERT ABRAMS, Attorney General of the State of New York, Albany, NY (Jeremiah Jochnowitz, Assistant Solicitor General, and John Q. Driscoll, Assistant Attorney General, of counsel), *for the Attorney General of the State of New York, Amicus Curiae*.

FRIENDLY, *Circuit Judge*:

This is the latest in a long series of challenges in the state and federal courts over the last decade to the constitutionality of § 210 of New York's Civil Service Law (the Taylor Law), which prohibits strikes by public employees. See *Cheeseman v. Carey*, 623 F.2d 1387, 1389-90 & note 3 (2 Cir. 1980). The action, brought under 42 U.S.C. § 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343(3), in the District Court for the Western District of New York, contests the procedures prescribed by § 210.2 for determining whether a public employee participated in a strike in violation of § 210.1 and for imposing a penalty on those determined to have so participated. The district court granted the named plaintiffs permission to represent a class consisting of "all persons who were penalized by defendants acting pursuant to CSL § 210 owing to their involvement in the teachers' strike that occurred in Buffalo between September 7th and 24th, 1976". Defendants are Eugene T. Reville, individually and as superintendent of Buffalo's schools; Claude D. Clapp, individually and as chief fiscal officer of the Buffalo public school system; and the members of the Board of Education of the City School District of Buffalo. Both sides moved for summary judgment. In somewhat of a *dubitante* opinion, Judge Elfvin granted the defendants' motion, 539 F.Supp. 87 (1982). This appeal followed.

The procedures for determining violations of the Taylor Law and imposing penalties therefor are prescribed by § 210.2, the relevant paragraphs of which we have set out in full in the margin.[1] The "chief executive officer" of the

[1] (d) Determination. In the event that it appears that a violation of this subdivision may have occurred, the chief executive officer of

governmental unit involved is empowered to determine, "on the basis of such investigation and affidavits as he

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the government involved shall, on the basis of such investigation and affidavits as he may deem appropriate, determine whether or not such violation has occurred and the date or dates of such violation. If the chief executive officer determines that such violation has occurred, he shall further determine, on the basis of such further investigation and affidavits as he may deem appropriate, the names of employees who committed such violation and the date or dates thereof. Such determination shall not be deemed to be final until the completion of the procedures provided for in this subdivision.

(e) Notice. The chief executive officer shall forthwith notify each employee that he has been found to have committed such violation the date or dates thereof and of his right to object to such determination pursuant to paragraph (h) of this subdivision; he shall also notify the chief fiscal officer of the names of all such employees and of the total number of days, or part thereof, on which it has been determined that such violation occurred. Notice to each employee shall be by personal service or by certified mail to his last address filed by him with his employer.

(g) Payroll Deductions. Not earlier than thirty nor later than ninety days following the date of such determination, the chief fiscal officer of the government involved shall deduct from the compensation of each such public employee an amount equal to twice his daily rate of pay for each day or part thereof that it was determined that he had violated this subdivision; such rate of pay to be computed as of the time of such violation. In computing such deduction, credit shall be allowed for amounts already withheld from such employee's compensation on account of his absence from work or other withholding of services on such day or days. In computing the aforesaid thirty to ninety day period of time following the determination of a violation pursuant to subdivision (d) of paragraph two of this section and where the employee's annual compensation is paid over a period of time which is less than fifty-two weeks, that period of time between the last day of the last payroll period of the employment term in which the violation occurred and the first day of the first payroll period of the next succeeding employment term shall be disregarded and not counted.

(h) Objections and restoration. Any employee determined to have violated this subdivision may object to such determination by filing with the chief executive officer, (within twenty days of the date on which notice was served or mailed to him pursuant to paragraph (e) of this subdivision) his sworn affidavit, supported by available documentary proof, containing a short and plain state-

may deem appropriate", whether an illegal strike has occurred and which employees have participated. § 210.2(d). In making the latter determination he may employ the presumption, established by § 210.2(b), that an "employee who is absent from work without permission, or who abstains wholly or in part from the full performance of his duties in his normal manner without permission", has participated in the strike. An employee who has been notified that the chief executive officer has found him to have participated in an illegal strike may object to this initial determination by filing a "sworn affidavit, supported by available documentary proof, containing a short and plain statement of the facts upon which he relies . . . ." § 210.2(h). The chief executive officer evaluates the objections and is obliged to refer

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ment of the facts upon which he relies to show that such determination was incorrect. Such affidavit shall be subject to the penalties of perjury. If the chief executive officer shall determine that the affidavit and supporting proof establishes that the employee did not violate this subdivision, he shall sustain the objection. If the chief executive officer shall determine that the affidavit and supporting proof fails to establish that the employee did not violate this subdivision, he shall dismiss the objection and so notify the employee. If the chief executive officer shall determine that the affidavit and supporting proof raises a question of fact which, if resolved in favor of the employee, would establish that the employee did not violate this subdivision, he shall appoint a hearing officer to determine whether in fact the employee did violate this subdivision after a hearing at which such employee shall bear the burden of proof. If the hearing officer shall determine that the employee failed to establish that he did not violate this subdivision, the chief executive officer shall so notify the employee. If the chief executive officer sustains an objection or the hearing officer determines on a preponderance of the evidence that such employee did not violate this subdivision, the chief executive officer shall forthwith restore to the employee the tenure suspended pursuant to paragraph (f) of this subdivision, and notify the chief fiscal officer who shall thereupon cease all further deductions and refund any deductions previously made pursuant to this subdivision. The determinations provided in this paragraph shall be reviewable pursuant to article seventy-eight of the civil practice law and rules.

those raising material questions of fact to a hearing officer. *id.* Between 30 and 90 days after the chief executive officer's initial determination, the "chief fiscal officer" begins payroll deductions of amounts equal to twice the daily rate of pay for each day on strike. These deductions are not stayed until the employee's objection has been sustained, at which time all deductions previously made are refunded. §§ 210.2(g), (h). The determinations made under § 210.2(h), including the chief executive officer's determination whether an objection raises a material question of fact, are judicially reviewable pursuant to Article 78 of the New York CPLR.

The stipulation upon which summary judgment was entered below was, in relevant part, as follows. On September 7, 1976, approximately 3000 of the 3300 school teachers employed by the Buffalo School District commenced a strike which continued through September 24, 1976. By notice dated October 14, 1976, Superintendent of Schools Reville, the district's "chief executive officer", see § 201.10, informed these 3000 teachers that he had found them to have participated in an illegal strike. Approximately 400 teachers, including the four named plaintiffs,[2] filed objections. Some 325 of these, again including the named plaintiffs, received notices, signed by Reville, dismissing their objections and denying a hearing on the ground that they had failed to establish that they had not participated or to raise a question of fact as to their participation. Several of those who were thus denied a hearing availed themselves of the opportu-

[2] Each of the objections filed by named plaintiffs Wolkenstein, Silkes, and Rumore consists in good part of what appears to be a form affidavit, alleging, *inter alia*, that the employee's absence was caused by the provocative actions of the Board of Education. The record on appeal contains none of the other 400 or so objections filed.

nity provided by § 210.2(h) to challenge Reville's determination in an Article 78 proceeding; the Supreme Court of New York directed that hearings be held in three such cases. The payroll deductions made by Deputy Superintendent Clapp, the district's "chief fiscal officer", totalled some $6 million, all of which was applied to the school district's operating budget. Finally, it was stipulated that Reville and Clapp were "involved in the formation of the budget and the planning with regard to the utilization" of the $6 million.

On the basis of this stipulation plaintiffs sought below a declaration that the procedures in § 210.2 deprived them of their property without due process of law. They made two claims. The first was that Reville, given his various executive responsibilities for the school system's operation and budget, has a disqualifying interest in the determinations he makes under § 210.2(h). The second was that the procedures are infirm on their face for failure to provide hearings prior to the commencement of payroll deductions. The first claim was rejected by the district court, not without evident misgivings, on the basis of a prior decision of this court.[1] The second claim was found to be settled authoritatively against plaintiffs by the Supreme Court's dismissal of the appeal from *Sanford v. Rockefeller*, 364 N.Y.S.2d 450 (1974), "for want of a substantial federal question", 421 U.S. 973 (1975).

[1] The district judge considered himself bound by our decision in *Kornit v. Board of Education*, 591 F.2d 1330 (2 Cir. 1978), *cert. denied*, 440 U.S. 936 (1979), which sustained § 210.2(h) against a claim of the sort raised here. The decision in *Kornit*, however, was rendered in an unpublished opinion. As such it is subject to our local rule § 0.23 which denies precedential status to summary orders. It could be argued that this rule should not be applied with full rigor to an order, like that in *Kornit*, which affirmed "substantially for the reasons stated by [the district judge]". Be that as it may, we do not rely on *Kornit* here but consider the matter afresh.

Since plaintiffs have not renewed their second claim, the sole question for review is whether in authorizing Superintendent Reville to pass on the legal sufficiency of objections, § 210.2(h) transgresses the command, rooted in common law practice, see *Bonham's Case*, 8 Co. 107a, 77 Eng. Rep. 638 (K.B. 1608); 2 Cooley, Constitutional Limitations 870-75 (8th ed. 1927), and considered to be inherent in the due process clause of the 14th amendment, see *In re Murchison*, 349 U.S. 133, 137 (1955), that no person shall be judge in a case in the outcome of which he has an interest. The constitutional contours of that command have been most fully explored in a quintet of Supreme Court decisions: *Tumey v. Ohio*, 273 U.S. 519 (1927); *Dugan v. Ohio*, 277 U.S. 61 (1928); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Hortonville Joint School District No. 1 v. Hortonville Educational Ass'n*, 426 U.S. 482 (1976); and *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980). Although none is conclusive of the precise question before us, we must look to these decisions in seeking a resolution.

Tumey, *Dugan* and *Ward* were criminal cases involving Ohio "Mayors' Courts". In *Tumey* the defendant had been convicted of violating the state's prohibition act after a trial before the mayor of North College Hill in the Village's "Liquor Court". Pursuant to state statute, half of the fines assessed in this court were retained by the Village. These funds were used partly to compensate the deputy marshals and detectives who secured evidence and the prosecutors who secured convictions, 273 U.S. at 518-19, and partly for general "village improvements and repairs", *id.* at 521. The Village ordinance establishing the Liquor Court further provided that the mayor receive "his costs in each case, in addition to his regular salary, as compensation for hearing such cases", *id.* at 519; how-

ever, no costs were paid to him unless the defendant was convicted. During a seven-month period in 1923 some $11,000 in fines redounded to the Village—this amounted to $10 per Village resident—and some $696 came to the mayor as costs in addition to his regular salary. *Id.* at 521-22. The scheme was held to violate due process on two grounds—first, because the mayor, "as an individual" had a "direct, personal, pecuniary interest" in the costs which he received from convictions, *id.* at 523, 531-35; second, because the mayor, as the Village's chief executive, charged with the business of looking after its finances, had a strong "official motive to convict and to graduate the fine to help the financial needs of the village", *id.* at 535.

A limitation on the second ground of *Tumey* was shortly set in *Dugan v. Ohio, supra*, 277 U.S. 61, written, as *Tumey* had been, by Chief Justice Taft. The defendant there had been convicted by the mayor of the city of Xenia for a state liquor offense. Since the mayor was a salaried official who did not participate in the costs collected or fines imposed by his court, the first ground of *Tumey* was inapplicable. Despite the fact that, as in *Tumey*, half of the fines imposed were retained by the city, the second ground was held inapplicable as well. The reason was that unlike the mayor of North College Hill, who "as chief executive was responsible for the financial condition of the village" and who thus "might be tempted to accumulate from heavy fines a large fund by which the running expenses of a small village could be paid, improvements might be made, and taxes reduced," *id.* at 65, the mayor of Xenia had no executive functions. Xenia had a commission form of government; the mayor was only one of five commissioners, while the "active executive" was the city manager. *Id.* at 63. The Court con-

cluded that the mayor's "relation under the Xenia charter, as one of five members of the city commission, to the fund contributed to by his fines as judge, or to the executive or financial policy of the city" was too "remote" to create a practical conflict of interest. *id.* at 65. This was said despite the fact that ultimate responsibility for raising the city's revenues, as for spending them, see *id.* at 62, presumably rested with the commission rather than the city manager.

Ward v. Village of Monroeville, supra, 409 U.S. 57, was held to fall within the second ground of *Tumey* rather than under *Dugan*. This was for two reasons. First, the village of Monroeville, like North College Hill, had a traditional form of municipal government in which the mayor had "wide executive powers" and exercised "general overall supervision of village affairs", *id.* at 58. Second, Monroeville, like North College Hill, derived a "major part" of its income from the fines and fees imposed by the mayor's court—ranging from 37% to 50% in the five years cited, *id.* at 58. Indeed, so vital was the revenue generated by the mayor's court that "when the state legislature threatened its loss, Monroeville retained a management consultant for advice upon the problem", *id.* at 58-59 and n. 1.

Hortonville, supra, 426 U.S. 482, like the instant case, dealt not with criminal proceedings but with the disciplining of teachers who had struck in violation of state law. The discipline, there dismissal rather than mere fine, was administered, however, not by the Hortonville school district's superintendent but by its elected seven-member School Board, which had engaged in the pre-strike negotiations with the teachers and had sole statutory authority to hire and fire. The Court rejected the dismissed teachers' due process challenge to the Board's impartial-

ity. Leaving open the question whether *Tumey* and *Ward* "state the governing standards when the decisionmaker is a public employer dealing with employees", it held that "the teachers did not show, and the Wisconsin courts did not find, that the Board members had the kind of personal or financial stake in the decision that might create a conflict of interest . . . ." *Id.* at 491. However, the decision is less telling for defendants in our case than the statement up to this point might seem to make it. The Board had engaged, the Court pointedly noted, not in adjudication—the dismissed teachers all admitted that they had struck—but in policy-making, to wit, determining whether dismissal or some less drastic measure, such as mediation or continued bargaining, would best serve the interests of the school system and the taxpayers. *Id.* at 494-95.[4] To such a decision the stringent standards of *Tumey* and *Ward* simply did not apply.[5]

The Court's most recent extended discussion of the impartiality requirement is *Marshall v. Jerrico, Inc.*, *supra*, 446 U.S. 238. At issue there was the constitutional-

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[4] Since the dismissed teachers conceded their participation in the strike, "there was no possibility of an erroneous factual determination on this critical threshold issue," *id.* at 494. The Board's decision to dismiss the teachers was "only incidentally a disciplinary decision; it had significant governmental and public policy dimensions as well." *Id.* at 495. In our case, in contrast, plaintiffs have not all admitted engaging in the 1976 strike; moreover, it is precisely this "critical threshold issue" which § 210.3(h) commits to Superintendent Reville's initial determination. Further, the imposition of penalties under § 210.3 involves no discretionary considerations whatever; the penalties flow automatically from Reville's finding of strike participation.

[5] *Hortonville* also rejected a claim of bias with respect to the policy decision based on the Board members' participation in the negotiations prior to the strike, which allegedly made it impossible for them to deal fairly with the question of remedy. This portion of the decision is not relevant here since the Taylor Law mandates the deduction for any public employee who was on strike.

ity of § 16(e) of the Fair Labor Standards Act, 29 U.S.C. § 216(e), under which sums collected as civil penalties for the unlawful employment of child labor are returned to the Employment Standards Administration (ESA) of the Department of Labor in reimbursement for the costs incurred by its assistant regional administrators ("administrators") in determining violations and assessing penalties. The Court unanimously rejected the claim that this statutory scheme impermissibly encouraged the administrators to make unduly numerous and large assessments. It held that the "rigid requirements of *Tumey* and *Ward*, designed for officials performing judicial or quasi-judicial functions", *id.* at 248, are inapplicable to the ESA's administrators whose function of assessing violations is "akin to that of a prosecutor or civil plaintiff" rather than a judge, *id.* at 247.[6] Beyond this the Court found that the reimbursement scheme does not offend the more relaxed standard applicable to "administrative prosecutors". The administrators are salaried officials who in no way profit personally from the assessments they make. Since the sums collected were very small—"substantially less" than 1% of the ESA's budget in the three years examined, and less than the amounts returned to the Treasury by the ESA in each of these years—there was no "realistic possibility" that the judgment of the administrators would be "distorted by the prospect of institutional gain . . .". *Id.* at 250. Moreover, the ESA's administration of § 16(e) had minimized the potential for bias. In the one year in which the ESA elected to allocate part of the civil penalties to the regional offices rather

[6] An employer against whom a penalty is assessed has the statutory right to a de novo hearing before an ALJ. It is the latter, not the assistant regional administrator, the Court found, who performs the function of "adjudicating" child labor violations.

than retain the entirety in the national office, it did so in proportion to the expenses incurred in investigating and prosecuting violations not in proportion to the amount of penalties actually collected. This being so, an administrator could not expect to benefit his own regional office by imposing large penalties. *Id.* at 251.

We are thus left with a case not so strong for unconstitutionality as *Tumey* and *Ward* and not so strong for constitutionality as *Hortonville* or *Jerrico*. Although *Dugan v. Ohio*, *supra*, 277 U.S. 61, surely is not directly on point, District Judge Leval may well have been right in thinking that decision, which stands in the middle of the continuum, to be a better guide for decision here than any of the other cases, see *O'Brien v. Board of Education*, 498 F.Supp. 1033, 1036 (S.D.N.Y. 1980). We hold that, for the reasons that follow, plaintiffs have not made out their claim.

We begin with the proposition that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation", *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961). Whether a particular decisionmaking procedure is constitutionally defective for want of impartiality will depend on many factors, among which are the character of the decision being made, see *Jerrico*, *supra*, 446 U.S. at 247-49, the nature of the individual and governmental interests at stake, see *Hortonville*, *supra*, 426 U.S. at 491, and the feasibility of alternative procedures. See, e.g., *Lopez v. Henry Phipps Plaza South, Inc.*, 498 F.2d 937, 943-44 (2 Cir. 1974) (manager of a publicly assisted housing project not so "management oriented" as to be disqualified from presiding over eviction hearing involving another project owned by the same federally funded landlord); *Powell v. Ward*, 542 F.2d 101 (2 Cir. 1976)

(prison official with direct responsibility for institutional security not disqualified solely by reason of his position from adjudicating allegations of breaches of prison security).

In the instant case the decisions which Superintendent Reville made under § 210.3(h) were neither "prosecutorial", compare *Jerrico*, nor "governmental", compare *Hortonville*, but adjudicative, and adjudicative in a very special sense. In evaluating the objections filed by the teachers Reville was deciding the purely legal question whether the excuse alleged for absence was sufficient as a matter of law. As our review of the authorities has shown, due process demands strict impartiality on the part of those who function in a judicial or quasi-judicial capacity. Nevertheless, the Court has made clear on several occasions that administrators serving as adjudicators are presumed to be unbiased. See, e.g., *United States v. Morgan*, 313 U.S. 409, 421 (1949); *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *Schweiker v. McClure*, 50 U.S.L.W. 4406 (April 20, 1982). This presumption can be rebutted by a showing of disqualifying interest, either pecuniary, see *Gibson v. Berryhill*, 411 U.S. 564, 578-79 (1973), or institutional, see *Ward, supra*, or both, see *Tumey, supra*. But the burden of establishing a disqualifying interest rests on the party making the assertion. *Schweiker v. McClure, supra*, 50 U.S.L.W. at 4408.

Fairly read, neither the facts stipulated to below nor the generalized assertions made here about Reville's "inconsistent" responsibilities, prove an interest on his part in the outcome of the determinations made under § 210.2(n) sufficient, under the Supreme Court's standards, to overcome the "presumption of honesty and integrity," *Withrow v. Larkin, supra*, 421 U.S. at 47, that attaches by virtue of his office. Even if the "rigid requirements" of

Tumey and *Ward* were thought applicable to administrative adjudication in the public employment context, a question, as we noted previously, expressly left open in *Hortonville, supra,* 426 U.S. at 481, plaintiffs simply have failed to show that Reville's situation is "one which would offer a possible temptation to the average man as a judge", *Tumey, supra,* 273 U.S. at 532; *Ward, supra,* 409 U.S. at 60; *Murchison, supra,* 349 U.S. at 136, to deny hearings to teachers whose objections were legally sufficient.

Plaintiffs do not contend that Reville has a "direct, personal, pecuniary interest" in the determinations he makes under § 210.2(h) of the sort found in *Tumey.*[7] Plaintiffs' contention is rather that because Reville has a strong "official motive", *Tumey, supra,* 273 U.S. at 535, to maximize the amount of penalties collected, the case falls within the second ground of *Tumey.* We find the contention unpersuasive for several reasons.

Unlike the mayors in *Tumey* and *Ward,* Reville is not responsible for seeing to it that the money needed to run Buffalo's schools is provided; that responsibility rests with the Mayor and Common Council. Plaintiffs refer vaguely to Reville's participation in the budgetary process, but they nowhere furnish details as to the precise part he takes. Common sense, confirmed by contempora-

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[7] Plaintiffs were well advised not to claim this. Superintendent Reville, like the mayor in *Dugan,* is a salaried official who in no way participates in the penalties collected under the Taylor Law. We cannot divine any indirect pecuniary interest Reville had or could be thought to have had in maximizing the penalties imposed. There is no allegation or proof that his compensation as superintendent varied inversely with the amounts paid to the teachers or that he would be likely to be rewarded for zeal in imposing penalties by a salary raise. One can, of course, suppose that Reville might fare better in an easy rather than a tight budgetary situation, but in that respect he seems not very different from the mayor in *Dugan.*

neous newspaper accounts of the school strike, attached as exhibits to defendants' motion to dismiss, see n.9, *infra*, and by the district court's researches, see 539 F.Supp. at 97, suggests that he prepares a proposed budget, but that his responsibility ends with preparing and defending it. Although the Superintendent has broad powers and duties, see N.Y. Education Law § 2566, it is the School Board, not he, who submits budgetary requests to the Mayor and Common Council. See 539 F.Supp. at 97. See also N.Y. Education Law § 2576. So far as the record shows, then, Reville is a public servant whose interest is only in running a successful operation for which elected officials must find the money. It cannot seriously be supposed that such an official would make unjustified determinations under § 210.2(h) simply to secure an increment in revenue for his district or to ingratiate himself with the Board and the taxpayers. For one thing, a superintendent's success depends in the long run* on many factors, not the least of which is the steady good will and support of his teachers. For another, Reville doubtless knew full well that the means of correcting any wrong decision on his part were readily at hand—in immediate Article 78 review. A record of frequent reversals would hardly further Reville's career.

In both *Tumey* and *Ward* the Court put great emphasis on the fact that the revenues generated by the Mayor's Court were very substantial and vitally important to the village's fiscal well being. See *Tumey, supra*, 273 U.S. at 521; *Ward, supra*, 409 U.S. at 58-59. These mayor's courts were ongoing institutions, doubtless prized by the

* The school superintendent in a district like Buffalo can afford to take the long view. He holds his position for a term of six years during which he cannot be removed save for cause. N.Y. Education Law § 2565.

local taxpayers, the purpose of which was as much to raise revenue as to enforce the state's liquor laws. The contrast with the instant case is plain enough. Neither in intent nor operation do the strike-penalty provisions of the Taylor Law serve primarily, or even significantly, to raise revenues; their evident purpose is to deter strikes by public employees. The imposition of penalties is sporadic and occasional—as sporadic and occasional as the strikes themselves. More important, the particular sums at stake in this case were hardly substantial enough to turn Reville's head. Of the $6 million stipulated to have been collected from the 3,000 striking teachers, only about $600,000 came from the 325 teachers whose objections were dismissed by Reville as insufficient on their face. See 539 F.Supp. at 95 n.4. This sum represents little more than half of one percent of the School Board's more than $100,000,000 budget for the 1976-77 fiscal year. The great disparity between this percentage and that in *Ward*, where the fines assessed in the Mayor's Court ran from one-third to one-half of the village's revenues, is not without constitutional significance. See *Jerrico, supra*, 446 U.S. at 245, 250-51.[9]

[9] We do not mean to suggest that $600,000 is a trifling sum even for a city of Buffalo's size. We are well aware that in times of severe fiscal stress a loss of $600,000 may force painful cutbacks in one school program or another. But the plaintiffs provide no information with which to assess the precise marginal utility of the $600,000 collected here. The stipulation says only that all of it "was applied by defendants with regard to the operating budget and expenses of the District." However, newspaper accounts of the strike, attached as exhibits to defendants' motion to dismiss the complaint, seem to indicate that the moneys were used to restore kindergarten and bus transportation programs—programs which had been sharply cut by the Board in an austerity budget which Reville, two months before the strike, had characterized as "totally inadequate". Further, Judge Elfvin's independent investigations revealed that the Board's supplemental budget request for 1976-77, the year of the strike, was a good deal smaller than in either the preceding or subsequent year, 539 F.Supp. at 98. The

An added reason for our conclusion is the nature of the determination made by Reville and the remedy provided for any error. In each of the 325 cases in which Reville dismissed objections without a hearing, he made a determination of law, namely, that taking the objector's affidavit and supporting proof to be true, the excuse proffered was insufficient. An objector dissatisfied with such a ruling had immediate recourse to an Article 78 proceeding, where the standard of review would be precisely the same as that applied by Reville in the first instance. See CPLR 7803(3) and *Sanford v. Rockefeller*, 364 N.Y.S.2d 450, 454-56 (1974), appeal dismissed for want of a substantial federal question, 421 U.S. 973 (1975). Here, as indicated, as a result of Article 78 review, hearings were directed to be held in three cases. See also *Zarella v. Koch*, 425 N.Y.S.2d 582 (App. Div., 1st Dept. 1980) (affidavit of civil service employee, which stated that he telephoned to find out if he should report to work and was told that his plant was not operating, was sufficient to raise a question of fact requiring that a hearing office be appointed); *St. Pierre v. Board of Education*, 337 N.Y.S.2d 706 (App. Div., 3d Dept. 1972) (affidavits stating that employees reported for work at the customary time on day of strike and performed all usual duties until normal departure time were sufficient to require appointment of hearing officer). Under § 210.2(h), then, an employee who believes himself entitled to a hearing on the question of his strike participa-

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plaintiffs, however, have made nothing of this either here or in the district court. Their claim relies only on the barebones stipulation of facts summarized above and certain general propositions about Reville's various executive responsibilities. In determining whether they have overcome the presumption that Reville is impartial, we necessarily confine ourselves to the claims plaintiffs have actually raised.

tion has two bites at the apple. If the chief executive officer dismisses his objection without a hearing, he can immediately request the state court to pass on the legal sufficiency of his objection. The interposition of the chief executive officer between the employee and the state courts serves the important state interest of relieving the latter of the need to evaluate the legal sufficiency of each and every objection filed, many of which are palpably without basis. We are, of course, mindful of the ruling in *Ward v. Village of Monroeville, supra,* 409 U.S. at 61-62, that the availability of a trial de novo before an unbiased judge did not remove the constitutional infirmity in an original trial before one whose impartiality was impaired, since a litigant "is entitled to a neutral and detached judge in the first instance." But we are by no means sure that this ruling, made in a criminal case, applies to the decision of a school administrator on a point of law which is subject to prompt, full, and inexpensive judicial review. Be that as it may, the preceding discussion has shown that plaintiffs here in fact received a neutral evaluation of their objections in the first instance.

In sum, while New York, in only to avoid litigation on facts more persuasive than those here, might be well advised to commit the initial evaluation of the legal sufficiency of objections to some other administrator lower in the administrative hierarchy than the chief executive officer, these plaintiffs have demonstrated no violation of their federal constitutional rights, and summary judgment for defendants was properly entered.

Affirmed.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GLORIA WOLKENSTEIN, KATHRYN SILKES, PHILIP RUMORE and VINCENT NOLA, individually and on behalf of all others similarly situated,

CIV-77-618

Plaintiffs,

-vs-

EUGENE T. REVILLE, individually and as Superintendent of Schools; CLAUDE D. CLAPP, individually and as Chief Fiscal Officer of the City of Buffalo Public School System; FLORENCE E. BAUGH; DAVID KELLY; JOSEPH E. MURPHY; LOUIS C. BENTON; JOSEPH D. HILLERY; MOZELLA RICHARDSON; DENNIS BULERA; OSCAR SMUCKLER; JOHN C. FIORELLA, as members of the Board of Education of the City School District of the City of Buffalo,

MEMORANDUM and ORDER

Defendants

Plaintiffs have brought this class action on behalf of themselves and others similarly situated, seeking a judgment declaring the procedures set forth in section 210 of New York's Civil Service Law ["CSL"] unconstitutional on their face and as applied because they deprive public employees of their property without due process of law. Plaintiffs allege that these procedures are defective in that they (1) fail to provide an impartial initial hearing on the question of strike participation, and (2) do not provide any hearing at all prior to the commencement of deductions from wages as a penalty for strike participation. Plaintiffs also seek to recover the amounts deducted from their wages and from the wages of the class in accordance with those procedures. Now

before me are plaintiffs' motions for class action certification pursuant to Fed.R.Civ.P. rule 23 and for summary judgment pursuant to Fed.R.Civ.P. rule 56. Defendants have submitted memoranda opposing plaintiffs' motion for summary judgment; no opposition has been raised anent the motion for class action certification.

Background

The individual plaintiffs, together with "all others similarly situated" in this case, comprise a body consisting of nearly 3,000 persons, all of whom were teachers in the Buffalo public school system at the time of a teachers' strike beginning September 7, 1976 and ending September 24, 1976. On October 14, 1976 defendant Reville, Buffalo's Superintendent of Schools, determined that this strike violated CSL §210 and that each of the individual plaintiffs and all of the members of the class had participated in the strike. By a notice dated October 14, 1976, Reville informed plaintiffs and the members of the proposed class of this determination and advised them that they were subject to the penalties provided by CSL §§210.2(f) and (g). These paragraphs, since repealed,[1] imposed on striking public employees a one-year probationary period and payroll deductions in an amount equal to twice the daily

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[1] The paragraphs prescribing the procedure for imposing these penalties (CSL §210.2(d), (e), (h)), challenged by plaintiffs on due process grounds, are still in effect.

rate of pay for each day of participation in a strike.

According to a stipulation by the parties, the named plaintiffs filed objections to Reville's October 14th determinations, as authorized by CSL §210.2(h), which provides for review by Reville of his initial determination. On December 3, 1976 the named plaintiffs received form notices summarily dismissing their objections and denying a hearing, on the grounds that they had failed to establish that they did not participate in the strike or to raise a question of fact as to their participation, as provided by section 210.2(h). Altogether approximately 400 members of the proposed class filed such objections, of whom about 325 were denied hearings on the same grounds. These secondary determinations by Reville were challenged by several class members in the New York courts, pursuant to CSL §210.2(h) and Article 78 of New York's Civil Practice Law and Rules ["CPLR"]. It is stipulated that of these challenges only three led to a hearing on the merits. The results of these hearings have not been indicated.

It is further stipulated that defendant Clapp caused approximately six million dollars in section 210 penalties to be deducted from the salaries of the members of the proposed class, the deductions being made in three parts from paychecks due on the third, seventeenth and thirty-first of December, 1976. It is stipulated that this entire amount was retained by defendants and applied by them to the operating budget and expenses of the Buffalo School District.

Plaintiffs' Motion For Class Action Certification

In order to certify an action as a class action this Court must be satisfied both that the prerequisites to a class action stated in Fed.R.Civ.P. rule 23(a) are met and that the action falls in one of the categories set forth in Fed.R.Civ.P. rule 23(b).

The rule 23(a) prerequisites to a class action are four:

> "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

Prerequisite (2) presents no obstacle to certification here. There are apparently no questions of fact involved, except tangential issues related to the requested relief. Plaintiffs urge the invalidity of the law under which they were penalized without regard to factual guilt or innocence. This contention is the only central question of law presented by the Complaint and it is clearly common to all who were penalized under the statute in issue. This point demonstrates that the typicality requirement of prerequisite (3) is also satisfied.

The numerosity requirement, prerequisite (1), would also appear to be amply satisfied where the class that plaintiffs allege to be entitled to relief numbers nearly 3,000 members. It has been observed that "while there are exceptions, numbers in excess of forty, particularly those

exceeding one hundred or one thousand have sustained the [numerosity] requirement." 3B Moore's Federal Practice, ¶23.05[1].

Although defendants have not directly opposed certification, they have made a passing reference to the plaintiffs' "failure to exhaust their administrative remedies," in opposing plaintiffs' motion for summary judgment. Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment, at p.6. If the failure of most members of the putative class of nearly 3,000 plaintiffs to avail themselves of state administrative remedies under CSL §210.2(h) would bar them from participating in the present action, the number of the potential class would be greatly reduced and fulfillment of the numerosity prerequisite would become less apparent.

Such a result is not warranted here. Although the exhaustion requirement applies to class actions just as it does to individual actions, "it is not necessary for each member of an alleged class to exhaust administrative remedies in order for a class action to be maintained." Barlow v. Marion Cty. Hospital Dist., 495 F.Supp. 682, 693 (M.D. Fla. 1980). The rule, rather, is "that exhaustion by at least one member seeking to represent the class is a necessary prerequisite for a class action." Ibid., citing Swain v. Hoffman, 547 F.2d 921 (5th Cir. 1977), and Phillips v. Klassen, 502 F.2d 362 (D.C. Cir. 1974). Inasmuch as it is

apparent from the defendants' own representations that many of the class here have exhausted the state administrative remedies, with six of them actually proceeding to state judicial review of the administrative determinations, no exhaustion problem arises in this case to obstruct certification of the proposed class.

Other grounds also support this conclusion. The United States Court of Appeals for the Second Circuit has recently indicated that exhaustion of state administrative remedies is not required where a plaintiff's federal civil rights claim is that the available state administrative remedies cannot afford due process of the law, so that "the adequacy of the remedy is 'for all practical purposes coextensive with the merits of the plaintiff's constitutional claim.'" Swan v. Stoneman, 635 F.2d 97, 103-04 (1980). Plaintiffs here, like the plaintiff in Swan v. Stoneman, have directly challenged the sufficiency of the state remedies so that "it would be pointless to require [plaintiffs] to exhaust those remedies." Id. at 104. Also arguing for this result is the unavailability of the desired class relief in the state administrative procedures. See, id., at 104-05. It should be additionally noted that "[i]t is well settled that exhaustion of state judicial remedies is not a prerequisite to adjudication of [42 U.S.C.] §1983 claims in federal court." Id. at 102.

I conclude, then, that the exhaustion doctrine poses no obstacle to inclusion of the entire class argued for by

plaintiffs, and that a class numbering nearly 3,000 satisfies the numerosity requirement of Fed.R.Civ.P. rule 23(a)(1).

The fourth prerequisite under rule 23(a), that the individual plaintiffs will adequately represent the interests of the class, presents a subtler question. As the United States Court of Appeals for the Second Circuit has put it,

> "an essential concomitant of adequate representation is that the party's attorney be qualified, experienced and generally able to conduct the proposed litigation. Additionally, it is necessary to eliminate so far as possible the likelihood that the litigants are involved in a collusive suit or that plaintiff has interests antagonistic to those of the remainder of the class." Eisen v. Carlisle & Jacquelin, 391 F.2d 555 562 (1968).

Nothing has appeared to suggest to me that plaintiffs' counsel is not competent to conduct the present litigation. Neither has there been any indication that this is a collusive lawsuit or that the individual plaintiffs' interests conflict with those of the class they seek to represent.

However, in recent years the financial resources of individual plaintiffs have become a significant factor in assessing ability to conduct the proposed litigation, numerous courts having denied class certification to financially weak plaintiffs. See, e.g., National Auto Brokers Corp. v. General Motors Corp., 376 F.Supp. 620, 637-38 (S.D.N.Y. 1974) (weak financial condition); Held v. Missouri Pacific Railroad Company, 64 F.R.D. 346, 350 (S.D. Texas 1974) (plaintiff lacked resources to notify other members of the

class and meet other expenses); Ralston v. Volkswagenwerk, A.G., 61 F.R.D. 427 (W.D. Mo. 1973). The question of individual plaintiffs' financial ability to well represent an entire class should not be dealt with lightly, especially where, as here, the issues directly touch the rights of many more than the members of the class.

Plaintiffs have the burden of proving that they will adequately represent the interests of the class. See, e.g., Matarazzo v. Friendly Ice Cream Corporation, 62 F.R.D. 65, 68 (E.D.N.Y. 1974). The Plaintiffs' "Motion for Certification Under F.R.C.P. 23" and supporting affidavit and memorandum of law establish in the main that the individual plaintiffs will adequately represent the proposed class insofar as commonality of interest is concerned, but also raise the question whether it is proper to permit plaintiffs' financial capability to be bolstered by the resources of organizations who are not and cannot be parties to this lawsuit. Plaintiffs' papers clearly indicate that such organizations will bear the brunt, if not the entirety, of the costs of this litigation. If this arrangement is not proper, then plaintiffs will have failed to meet their burden of proving adequacy of representation. However, I think that in all the circumstances of this case it is not improper.

The allegations in plaintiffs' moving papers clearly establish that it is with the resources of the Buffalo Teachers Federation, Inc. and its state affiliate, the

New York Educators Association (whose employees plaintiffs' lawyers are), that plaintiffs are able to conduct this litigation.

A recent decision of the United States District Court for the Northern District of New York, Brame v. Ray Bills Finance Corp., 85 F.R.D. 568 (1979), considered the propriety, in terms of both financial and ethical adequacy of representation, of permitting an organization that provides free legal services to indigents to advance and be ultimately responsible for the costs of a class suit. The individual plaintiff was not indigent but was nonetheless unable to finance the litigation. The court saw no obstacle to finding that this arrangement rendered the plaintiff a financially adequate representative. Id., at 576. As to the ethical objections of the defendants, the court found that, because "public or charitable funds, and not the personal funds of plaintiffs' attorneys," were supporting the litigation, such attorneys did not have interests in conflict with the named plaintiffs or the class, such as may arise where an attorney acquires a financial interest in the outcome of the litigation. Id., at 578-79.

The situation confronting us compares favorably to that in Brame v. Ray Bills Finance Corp., supra. The funds involved are not public or charitable, but neither are they those of plaintiffs' lawyers; the funds are those of organizations whose interests are presumably coextensive with

plaintiffs' interests. Such a voluntary assumption of litigation costs, by organizations which are benign from an ethical point of view, should pose no problem for class action certification.

Comparison with the reasoning and decision in Ralston v. Volkswagenwerk, A.G., supra, where plaintiffs were denied certification, further supports this result. The court in Ralston inquired closely into the financial resources of the individual plaintiffs, observing that in order to be considered adequate representatives they "must sustain the burden of showing that their resources are adequate to pursue this lawsuit to completion, even in the absence of any additional financial contributions from members of the purported class." 61 F.R.D. at 433. (Emphasis added.) This stricture against reliance upon contributions from the class was made because of the uncertainty in that case that such support was forthcoming, the court noting that the "very heavy responsibility" of a class lawsuit "should never be undertaken in the hope that at some future date the existence of a class will aid the plaintiffs, because nobody knows whether other unidentified members of the class are able or willing to finance the action." Id., at 434. The court further observed: "All of this is not to say that large numbers of persons should not coalesce their finances in supporting a class action." Ibid. In the case before me there is apparently no uncertainty that the necessary funds

to support this action will proceed from groups comprised of persons who are either members of the class or whose interests are directly aligned with the class members.

Finally, the policy expressed in Fed.R.Civ.P. rule 23.2 seems to support allowing organizations that themselves lack standing to finance a class action suit. The Advisory Committee's Notes to this rule, which was added in 1966, indicate that the purpose of viewing an action by or against members of an unincorporated association as a class action "has been to give 'entity treatment' to the association when for formal reasons it cannot sue or be sued as a jural person." The rule itself clearly states that a class action may be brought "by *** the members of an unincorporated association by naming certain members as representative parties." This language clearly implies that the resources of a group that lacks standing may support a class action in the name of representative parties.

The Buffalo Teachers Federation lacks standing, even though incorporated, because of the personal nature of the rights involved. The policy of rule 23.2 and the reasoning in the cases discussed above nonetheless argue that the backing of the Buffalo Teachers Federation and its state affiliate may constitute plaintiffs financially adequate class representatives, and I so find them.

The rule 23(a) prerequisites to a class action having been found satisfied, it remains only to determine whether or not this action is maintainable as a class action under

rule 23(b). Plaintiffs argue that, if individual actions were brought by the aggrieved parties, there is a risk of inconsistent and varying adjudications which would bring the case within rule 23(b)(1)(A). However, I do not think that such is a great risk where the primary relief sought is a declaration that a statutory scheme is constitutionally defective. Similarly, there is small risk that "adjudications with respect to individual members of the class *** would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests," the test of rule 23(b)(1)(B).

Thus, neither clause (A) or (B) of rule 23(b)(1) is clearly applicable here. However, both paragraph (2) and paragraph (3) of rule 23(b) seem quite relevant. Rule 23(b)(2) provides that a class action may be maintained where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Defendants applied the challenged statutory sanctions to each of the members of the proposed class, and thus "ha[ve] acted *** on grounds generally applicable to the class." This paragraph so plainly applies to the instant proceeding that I find it unnecessary to deal with the applicability of paragraph (3), which, having considered the matter, I nonetheless find to apply here.

Thus I grant plaintiffs' motion for class action certification. The class of persons is to consist of all persons who were penalized by defendants acting pursuant to CSL §210, owing to their involvement in the teachers' strike that occurred in Buffalo between September 7th and 24th, 1976.

Plaintiffs' Motion for Summary Judgment

In June, 1979 I denied defendants' motion to dismiss the Complaint, finding that plaintiffs had stated a claim regarding the potential bias of both Reville in his role as adjudicator and of any hearing officer appointed by Reville to hear plaintiffs' objections to Reville's determinations of strike participation. I also held that neither party had yet sufficiently delineated the precise interests or facts involved in plaintiffs' claim regarding the lack of a prededuction hearing to permit the application of due process principles. Today, I find it necessary to deny plaintiffs' motion for summary judgment and to grant summary judgment to defendants as to all plaintiffs' claims, for the reasons and upon the analysis hereafter stated.

Lack of Initial Impartial Hearing Due to Bias of Reville

The statutory procedural provisions of CSL §210.2 under which plaintiffs claim they were not afforded an impartial initial hearing as to whether they participated in the 1976 strike read in relevant part as follows:

"(d) Determination. In the event that it appears that a violation of this subdivision may have occurred, the chief executive officer of the government involved shall, on the basis of such investigation and affidavits as he may deem appropriate, determine whether or not such violation has occurred and the date or dates of such violation. If the chief executive officer determines that such violation has occurred, he shall further determine, on the basis of such further investigation and affidavits as he may deem appropriate, the names of employees who committed such violation and the date or dates thereof. Such determination shall not be deemed to be final until the completion of the procedures provided for in this subdivision.

* * * * *

"(h) Objections and restoration. Any employee determined to have violated this subdivision may object to such determination by filing with the chief executive officer, (within twenty days of the date on which notice was served or mailed to him ***) his sworn affidavit, supported by available documentary proof, containing a short and plain statement of the facts upon which he relies to show that such determination was incorrect. *** If the chief executive officer shall determine that the affidavit and supporting proof fails to establish that the employee did not violate this subdivision, he shall sustain the objection. If the chief executive officer shall determine that the affidavit and supporting proof fails to establish that the employee did not violate this subdivision, he shall dismiss the objection and so notify the employee. If the chief executive officer shall determine that the affidavit and supporting proof raises [sic] a question of fact which, if resolved in favor of the employee, would establish that the employee did not violate this subdivision, he shall appoint a hearing officer to determine whether in fact the employee did violate this subdivision after a hearing at which such employee shall bear the burden of proof. *** If the chief executive officer sustains an objection or the hearing officer determines on a preponderance of the evidence that such employee did not violate this subdivision, the chief executive officer shall forthwith restore to the

> employee the tenure suspended pursuant to paragraph (f) of this subdivision, and notify the chief fiscal officer who shall thereupon cease all further deductions and refund any deductions previously made pursuant to this subdivision. The determinations provided in this paragraph shall be reviewable pursuant to article seventy-eight of the civil practice law and rules."

This procedure thus places on the chief executive officer the responsibility to determine in the first instance who has engaged in an illegal strike, and thereafter to determine the correctness of those determinations regarding employees who file objections to the initial determination in their cases. This subsequent determination, should it be against the objecting employee, is not reviewable de novo, either by a hearing officer or court, but is subject to review only to determine whether it was arbitrary and capricious, as provided by Article 78 of the CPLR for determinations other than those made upon evidence taken at a lawful hearing (CPLR §7803.3).

Plaintiffs complain that Reville, the "chief executive officer" here, has a potential personal interest in these determinations great enough so that plaintiffs were not accorded due process of law in being subjected to his judgment. Plaintiffs rely for this conclusion chiefly on Tumey v. Ohio, 273 U.S. 510 (1927) (wherein it was held that due process required reversal of convictions by the mayor of a town when the mayor's salary was paid in part by fines and costs that he levied in his judicial role) and on Ward v.

Village of Monroeville, 409 U.S. 57 (1972) (wherein a procedure by which sums produced from a mayor's court accounted for a substantial portion of a village's total revenues was invalidated under the due process clause, even though the mayor's salary was not augmented by those sums).

I note that, even apart from the "job considerations" which plaintiffs say created an impermissible risk of bias, a statutory provision whereby an adjudicator of rights reviews his own initial finding is, at best, inherently suspect on due process grounds. See, Withrow v. Larkin, 421 U.S. 35, 58, n.25 (1975), citing Morrissey v. Brewer, 408 U.S. 471 (1972), wherein it is observed that "the officer directly involved in making recommendations cannot always have complete objectivity in evaluating them." (408 U.S. at 486). In Morrissey the Court premised its analysis on the assumption that the parole officer's review of his own recommendation for parole revocation was final (408 U.S. at 476-77), whereas in this case Reville's rejection of objections to his initial determination of strike participants was reviewable in a judicial article 78 proceeding, for the employees choosing to seek review. However, as I have noted, article 78 review is not de novo but will lead to affirmance if Reville's decision is not arbitrary or capricious -- an exacting standard that can cover a multitude of

misdeterminations.[2] Moreover, the procedure for parole revocation that the Court prescribed in Morrissey called for a review of the revocation recommendation by an independent decision maker as a preliminary to a full hearing de novo. 408 U.S. at 485-86. This is in line with the oft-enunciated principle that an accused "is entitled to a neutral and detached judge in the first instance" (Ward v. Village of Monroeville, supra, 409 U.S. at 61-62), the non-observance of which is not excused by the availability of review de novo (ibid.), which review was unavailable here.

Notwithstanding these tentative criticisms of the section 210 procedure, I discern a distinction between this case and Morrissey that, with other considerations, leads me to refrain from pronouncing the instant procedure constitutionally defective under Morrissey. It appears that the United States Supreme Court's criticism of the procedure at issue in Morrissey was evoked not only by the "double adjudication" by a single individual -- a parole officer's revocation recommendation followed by a self-affirmance of that recommendation -- but also in part by the extent of the parole

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[2] Cf., Sanford v. Rockefeller, 25 N.Y.2d 547, 573-76, 364 N.Y.S.2d 450, 471-73 (1974) (dissenting opinion of Judge Wachtler), suggesting that the "substantial evidence" standard of CPLR §7803.4 applies to the superintendent's determinations, but concluding nonetheless as to article 78 as a whole that "[i]f a procedure is constitutionally defective at the administrative level, article 78 cannot rectify it," because "article 78 is not designed to supply due process; it is not an evidentiary hearing but merely an evaluation of what has gone before."

officer's pre-involvement in the parolee's case.[3] Under this view the legality of the superintendent's role under

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[3] "Parole agents are human, and it is possible that friction between the agent and parolee may have influenced the agent's judgment." 408 U.S. at 486 n.14. In the absence of countervailing considerations, I would declare any such possible distinction as either overcome by Reville's pre-involvement in the failed collective bargaining process and in the superintendence of teacher conduct in general pursuant to N.Y. Education Law §2566 (see note 6 infra), or else counterbalanced by the complete absence of de novo review. Neither the cases nor the constitution support distinguishing Morrissey on the grounds that the parolee's interest in physical liberty is greater than an employee's interest in his or her earnings; the utmost circumspection required of our government when it acts to diminish its subjects' possessions of whatever form does not require full procedural protections in all cases, but an impartial initial adjudication is an irreducible minimum (Cf., Ward v. Village of Monroeville, supra). Here, as much as in Morrissey, it can be said that "[a] State could certainly choose some other independent decision maker to perform this preliminary function." 408 U.S. at 486.

It is true that in Hortonville Dist. v. Hortonville Ed. Assn., 426 U.S. 482 (1976), the argument that the prior role as negotiator of the Board in that case disqualified it, under Morrissey, from deciding to fire the striking teachers was rejected. However, in Hortonville only the particular decision of the petitioner there had been assailed on due process grounds, not the constitutional sufficiency of the state statute involved. It is clear that the Court found that the prior negotiations did not disqualify the Board from imposing the sanction of discharge because (1) "there was no possibility of an erroneous factual determination on [the] critical threshold issue" of who had engaged in the strike, inasmuch as all the discharged teachers had admitted their participation (426 U.S. at 494); and (2) "[t]he Board's decision whether to dismiss striking teachers involves broad considerations," its decision "was only incidentally a disciplinary decision; it had significant governmental and public policy dimensions as well." 426 U.S. at 482. Here, by contrast, the plaintiffs' class members have not all admitted engaging in the 1976 strike and it is precisely this "critical threshold determination" that Reville was charged with and is in issue here. The imposition of penalties is here at issue only to the extent that it flowed from Reville's findings as to who were strike participants, because the section 210 penalties involved are automatic and inflexible.

section 210 may become bound up with plaintiffs' claim that his responsibility for collective bargaining with teachers, plus his primary role in arranging the school district's budget, rendered him unfit under the principles of Ward v. Village of Monroeville, supra, to determine who had participated in the strike, especially where his determinations appreciably augmented the school district's fisc.[4] As explained hereafter, I find it necessary to reject plaintiffs' challenge under Ward, and so also decline to invalidate the challenged procedures under Morrissey.

The section 210 procedures have in recent years been challenged for failure to provide impartial adjudication in several cases brought by teachers in the district courts of New York. In Kornit v. Board of Ed., Plainview-Old Bethpage School District, Civ. No. 75-518 (E.D.N.Y., July 22, 1975), remanded (for lack of subject matter jurisdiction) 542 F.2d 593 (2d Cir. 1976), remanded (for further consideration)

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[4] According to the factual stipulation of the parties, about 32% of the nearly 3,000 class members here, over one-tenth, were denied hearings by Reville on their objections to his preliminary determination that they had participated in the strike, on the ground that their objections raised no issue of fact regarding this question. The stipulation indicates that about $6,000,000 was deducted from the wages of all the class members in this action and thereafter used to defray school district expenses, suggesting that about $600,000 was derived from penalties imposed upon those to whom Reville denied hearings alone. This sum, although perhaps not great in relation to the total Buffalo Board of Education budget for 1976-77 (see text infra) nonetheless quite certainly would have paid the salaries of at least thirty teachers or about one-tenth of the total force at that time. Further evaluation of the significance of the penalty amounts appear in the text, infra.

438 U.S. 902, aff'd (without opinion[5]), 591 F.2d 1330 (2d Cir. 1978), cert. denied, 440 U.S. 936 (1979), the first of these cases, the district court judge rejected the charge of bias due to pecuniary interest in augmenting the school district budget:

> "There is no indication that any school official had a personal pecuniary interest which would be affected by whether plaintiff's absence from work was authorized or excusable, as was the case in Gibson v. Berryhill, 411 U.S. 564, 93 S.Ct. 1689 (1973). In the second place, the provision for judicial review of any administrative decision under Article 78 of the New York Civil Practice Law and Rules would permit determination of this point." Slip Opinion at p.6.

I have already indicated my perception that article 78 review, which is not de novo, could not possibly make up for a failure to provide an impartial adjudication in the first instance -- which is in any case a constitutional entitlement regardless of subsequent provisions of procedure. The United States Court of Appeals for the Second Circuit evidently concluded that the plaintiff in Kornit had failed to establish a significant potential for bias in the first instance adjudication, for the court ultimately affirmed the district court's judgment "substantially for the reasons stated by the [district court judge]."

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[5] The appellate order adopting a portion of Judge Judd's initial decision did however explicitly set forth that "[t]he school officials involved did not have a sufficient pecuniary interest to disqualify them" and cited Hortonville Dist. v. Hortonville Ed. Assn., supra. The slip opinion and the 1978 appellate order in Kornit were furnished as Exhibits A and B to the Memorandum of Law on Behalf of the Attorney General of the State of New York, Intervenor.

Three district courts have, since Kornit, turned back claims like that advanced in Kornit and in the instant case that hearings were biased, mainly on the strength of the affirmance in Kornit. Starrs v. Bock, Civ. No. 77-5435 (S.D.N.Y., December 21, 1978), 12 P.E.R.B. 7501; Tepper v. Galloway, 481 F.Supp. 1211 (E.D.N.Y. 1979); O'Brien v. Board of Ed. of City Sch. Dist., Etc., 498 F.Supp. 1033 (S.D.N.Y. 1980).[6] While the earnest challenges of New York

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[6] In response to the O'Brien plaintiff's contention "that the courts in Tepper, Starrs and Kornit neglected to give due weight to the Supreme Court's decision in Ward v. Monroeville," the court in O'Brien noted that:

> "The Court in Ward distinguished the case of Dugan v. Ohio, 277 U.S. 61, 48 S.Ct. 439, 72 L.Ed. 784 (1928), in which a mayor who shared legislative and executive authority with four other persons was found to have a sufficiently remote relationship to the finances of the city to warrant leaving undisturbed the presumption that the mayor would act impartially when he sat as judge." 498 F.Supp. at 1035.

The O'Brien court concluded that the role of the chief executive of a school district in New York is sufficiently like that approved in Dugan to shield him or her from criticism upon Ward principles when fulfilling the role assigned by CSL §210 (id. at 1036). However, the Court in Dugan emphasized that

> "[t]he mayor has himself as such no executive but only judicial duties. His relation under the [City of] Xenia charter, as one of five members of the city commission, to the fund contributed to by

teachers to the Taylor Law procedures on the grounds of bias inherent in the procedures merit a thorough and authoritative reexamination, I too shall defer to our Court of Appeals on this question, addressed by that court in its affirmance of Kornit. Marshall v. Jerrico, Inc., 446 U.S. 238 (1979), has created good grounds for reexamining the relevance of the decision in Hortonville Dist. v. Hortonville Ed. Assn., supra, which plaintiffs tenably urge is distinguishable on several significant grounds from the case of New York teachers

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his fines as judge, or to the executive or financial policy of the city, is remote." 277 U.S., at 65.

Reville as superintendent has a direct relation to the executive and financial policy, as well as broad powers "[t]o enforce all provisions of law and all rules and regulations relating to the management of the schools" (N.Y. Education L. §2566.2.) He prepared the school district budget and submitted it to the Board of Education. He was responsible for the disciplining of teachers, being authorized "to report to [the] board of education violations of regulations and cases of insubordination, and to suspend [a] *** teacher *** until the next regular meeting of the board" (N.Y. Education L. §2566.6.) Quaere whether a teacher whom the superintendent had naturally come in the course of his duties to regard as a troublemaker or misfit can feel assured of due process as the superintendent reviews his or her objections to the determination of strike participation? The superintendent was also responsible for collective negotiations with the teachers' union. This role is not like that of the detached adjudicator approved in Dugan, but more like that of the excessively involved adjudicators condemned in Morrissey and in Ward.

under the Taylor Law.[7]

In Marshall v. Jerrico an Assistant Regional Administrator of the Employment Standards Administration ("the ESA") of the United States Department of Labor had assessed fines against the appellee for employing child labor in restaurants. Under section 16(e) of the Fair Labor Standards Act (29 U.S.C. §216(e)), such sums are returned to the ESA to reimburse the costs of determining violations and assessing penalties and may be allocated to ESA regional offices. The appellee had brought suit in federal district court, urging that this arrangement "created an impermissible risk and appearance of bias by encouraging the Assistant Regional Administrator to make unduly numerous and large assessments

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[7] For example, in Hortonville no pecuniary penalties were exacted, so there can have been no incentive to add to the Board's operating budget. And, as I have already pointed out, supra note 2, there was no question in Hortonville as to how many and which teachers had struck. Moreover, the challenged decision to discharge 86 teachers was made jointly by a seven-member elected school board, whereas Reville was a single individual retained on a contractual basis by the Buffalo Board of Education. The public, the employers of the Hortonville decision makers, might be seen as less likely to recognize and be grateful for a decision that redounded to the benefit of the Board in relation to the discharge of its duties, than would the Buffalo Board of Education be to appreciate the difference made by the $6,000,000 accruing to its budget as a result of Reville's determinations.

Recognition of these distinctions suggests that, in the situation of the instant case, more than that in Hortonville, there is a significant danger, if not to the reality then to the appearance of fairness, which "[generates] the feeling, so important to a popular government, that justice has been done." Marshall v. Jerrico, supra, 446 U.S. at 242, quoting from Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring).

of civil penalties." 446 U.S. at 241. The district court judge, acknowledging that the de novo review of the original assessment by an administrative law judge was unaffected by any interest in the amounts of penalties, nonetheless granted summary judgment for the appellee because the section 16(e) reimbursement arrangement "could distort the administrator's objectivity in assessing penalties." Id. at 241-42.

Although the plaintiffs' claims here of potential bias are significantly broader than that Reville had a personal interest in adding to the school district's funds, this is an important part of their claim; consequently, the United States Supreme Court's treatment of the analogous claim in Marshall v. Jerrico may shed light on the merits of plaintiffs' argument on this ground.

The United States Supreme Court reversed the district court in Marshall essentially upon three considerations:

> (1) The Assistant Regional Administrator "performs no judicial or quasi-judicial functions. He *** rules on no disputed factual or legal questions. The function of assessing a violation is akin to that of a prosecutor or civil plaintiff." Id. at 247;
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> (2) "If the employer excepts to a penalty *** he is entitled to a de novo hearing before an administrative law judge." Ibid.;
>
> (3) Upon close analysis of the dollar amounts involved, the Court concluded that "[i]n all three years [in question] the sums collected as child labor penalties amounted to substantially less than 1% of ESA's budget. And in each of those years, ESA did not spend the full amount appropriated to it ***. The amounts returned to the Treasury *** substantially exceeded the sums collected under §16(e) in all three years. The challenged provisions have not, therefore, resulted in any increase

in the funds available to ESA over the amount appropriated by Congress." Id., at 245-46.

The absence of the first two considerations (which relate to the applicable substantive standard) in the present case is patent. Reville clearly made judicial or quasi-judicial determinations on disputed factual or legal questions when he determined initially that plaintiffs and their class had struck, and subsequently that hundreds of the objections filed with him raised no question of fact regarding strike participation. These determinations moreover were not subject to de novo review, but only to limited Article 78 review. Thus "[t]he rigid requirements of Tumey [v. Ohio, supra] and Ward [v. Village of Monroeville, supra], designed for officials performing judicial or quasi-judicial functions" (446 U.S. at 248), found inapplicable in Marshall, fully apply here.

The third consideration, the insignificance of the penalties assessed to the overall budget of the ESA, also is not present here. It must, of course, be borne in mind that Reville had direct responsibilities in formulating the budget of the Buffalo Board of Education and in supervising expenditures. During the period in question, there was not the surplusage in the budget for the Buffalo Board of Education that the ESA had enjoyed in the period relevant in Marshall. For the 1975-76 fiscal year, the Board had requested an appropriation of $112,609,122, the Mayor of Buffalo had recommended that it receive $106,926,344, and the Buffalo Common Council had

approved only $103,826,344. 1975 Proceedings of the Buffalo Common Council [hereinafter "Proceedings"], 1212, 1606. For 1976-1977 the Board had requested $119,213,177, which the Mayor had reduced to $91,742,337, and the Board was eventually allocated only $108,399,337 by the Common Council. 1976 Proceedings 1119, 1587.

It is axiomatic that administrative bodies usually request more funding than they hope to receive and truly feel that they need. However, the indications are that the Buffalo Board of Education probably needed more funds than it received during this period. By a letter to the Common Council dated July 17, 1975, the Mayor indicated that the Board of Education and Reville had appeared before him seeking a supplemental budget for the 1975-76 school year of $4,975,956 to prevent termination of kindergarten, the free school bus-pass program, and adult education activities. 1975 Proceedings at 2085. The Mayor reduced this request to $4,266,548, which the Council approved. Id. at 2214.

Skipping for the moment the 1976-77 school year, the year of the strike, it appears that in 1977 the Board made an earnest request for an $11,400,000 supplemental budget for the 1977-78 school year, which the Mayor apologetically recommended be allowed only to the extent of $4,000,000, which amount the Common Council granted. 1977 Proceedings 3003, 3095. In recommending this reduced amount the Mayor wrote of the "many painful but necessary decisions" including "wage freezes, layoffs and hiring freezes," by which "[o]ver the

past few years, the City has successfully regained fiscal credibility." Id. at 3004. It is in this financial setting, far different from that depicted for the ESA in Marshall v. Jerrico, that the importance to the Buffalo Board of Education and Reville of the $6,000,000 strike penalties must be assessed.

For the 1976-77 school year, the year in which the strike penalties were deducted from plaintiffs' wages, the Board evidently had to make a far smaller supplemental budget request than in either the preceding or subsequent years. The Board requested only $1,741,508, which the Mayor reduced to $1,500,000 and put before the Council on December 23, 1976, not long after the strike penalty deductions were begun.[8] 1976 Proceedings 2982.

Under these financial circumstances, where the Superintendent was an active part of the budgetary processes, it may

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[8] This factual context, which was disclosed not by presentations of plaintiffs but by the investigation of the court, could perhaps strongly support a claim that the section 210 procedures are unconstitutional as applied to plaintiffs. Plaintiffs did in fact recite such a claim in their Complaint, but have never offered either allegations or proof of facts to support it, compelling the conclusion that plaintiffs have chosen to press only their claim of inherent unconstitutionality in the challenged procedures. In view of the high likelihood of recurrence of a factual context similar to this in future strikes of New York teachers, and the other potentially prejudicing entanglements of the chief executive officer (see note 3, supra), I conclude as perhaps plaintiffs did also that the constitutional sufficiency of the section 210 procedures must be assessed without reference to the facts of a particular application. The figures in the text are offered only to demonstrate the stressful financial context in which a chief executive officer of a New York school district may have to make decisions pursuant to CSL §210.

not be possible to find that Reville's personal interest in the penalty exactions was so remote that no tenable inference of bias can reasonably be drawn. The United States Supreme Court in Marshall v. Jerrico declined to say whether the far more remote connections between the decision maker, the penalties and the fisc in that case would support constitutional objections under the standards of Ward and Tumey. 446 U.S. at 252, n.14.[9] The clear and definite connections here, where these standards do apply, plus the other entanglements of Reville in the supervision of teachers and in making the initial determinations of strike participants for his own subsequent review, would warrant a full exploration of the relevance of the Ward, Tumey and Morrissey principles were I not constrained by Kornit v. Board of Education, supra. I do not find Marshall v. Jerrico a sufficiently sure guide to support a decision by

[9] In its conclusion, the Court in Marshall v. Jerrico recited five contingencies that would have to occur before the monetary penalties assessed by the ESA's Assistant Regional Administrator could benefit his or her operations so as to become an incentive for unbalanced administration, and concluded: "'[U]nder a realistic appraisal of psychological tendencies and human weakness,' Withrow v. Larkin, 421 U.S. 35, 47 (1975), it is exceedingly improbable that the assistant regional administrator's enforcement decision would be distorted by some expectation that all of these contingencies would simultaneously come to fruition" (446 U.S. at 252) and, consequently, that the challenged procedures did not violate due process standards of procedural fairness. In contrast, the penalties assessed in the instant case, according to a stipulation executed by the parties, were directly and immediately used to augment the Buffalo School District operating budget and defray its expenses.

me in possible conflict with that in Kornit. Plaintiffs' motion for summary judgment on their claimed denial of an impartial hearing must be denied. Because I view Kornit as effectively foreclosing further argument along this line, summary judgment against the movants and for defendants is proper at this time (see, Doe v. United States Civil Serv. Com'n, 483 F.Supp. 539, 571 n.29 (S.D.N.Y. 1980)).

Hearing Officer Appointed by Reville

Having concluded that it would be improper to invalidate the section 210 procedure for the initial determination of strike participation, and the subsequent determination of possible merit in objections thereto, on the grounds that Reville is an inappropriate adjudicator of these issues, the further conclusion is compelled that the mere appointment of an officer by Reville to hear those objections does not render the section 210 procedure for hearing objections invalid. Moreover, this conclusion would be required even if it had been determined that the role of Reville in making the initial determination and in initially assessing the merits of objections does render those procedures defective. In Morrissey v. Brewer, supra, the Court clearly indicated that the appointment of "some other independent decisionmaker" (emphasis added) would satisfy due process where a decision by a parolee's own parole officer would not, even if the other officer were merely "someone such as a parole officer other

than the one who has made the report of parole violations or has recommended revocation." 408 U.S. at 486. The Court expressly declined to require that the revocation decision be made by a "judicial officer" or even by a "'neutral and detached' officer." Ibid. In the instant case it is likewise necessary to conclude that the appointment by Reville of an officer to hear the objections would sufficiently attenuate the putative bias of Reville, absent grounds for disqualification of the particular officer appointed.

Lack of Pre-deduction Hearing

In June, 1975 I denied defendant's motion to dismiss plaintiffs' Complaint as to the alleged deprivation of due process by the state's failure to provide a hearing prior to the deduction of penalty amounts from their salaries. At that time I noted that dismissal at that juncture would have been inappropriate because neither side had sufficiently delineated and analyzed the competing interests involved in relation to the requirements of due process and that plaintiffs had not yet introduced evidence from which factual conclusions could be drawn relevant to their claim that the statutory procedure is invalid as applied to them. At this time I note that plaintiffs have not, on their motion for summary judgment, pressed their argument concerning the application of the statutory procedures to them. Nor have plaintiffs yet so much as alleged extreme hardships of the kind that the court in Cheeseman v. Carey, 485 F.Supp. 203,

217-20 (S.D.N.Y. 1980), determined justified a preliminary injunction requiring the state to extend Taylor Law strike penalty deductions from the salaries of plaintiffs-teachers in that case over a longer period of time than that prescribed by the statute. In any case, had plaintiffs here raised cogent arguments regarding the rate of deductions in relation to the constitutional validity of the Taylor Law's failure to provide pre-deduction hearings as applied to them, the decision of the United States Court of Appeals for the Second Circuit in Cheeseman, to the effect that "[t]he rate-of-deduction issue *** now lacks one of the requisites of a live controversy, namely a 'real and immediate' threat of injury faced by any member of the plaintiff class" (623 F.2d 1387, 1392 (1980)), would apply to bar prosecution of such claims. Moreover, I conclude that plaintiffs have abandoned the "as applied" claim of invalidity. Consequently, summary judgment for defendants is appropriate on plaintiffs' claim that the imposition of fines against them without a pre-deduction hearing is invalid as applied.

Thus we are left only with plaintiffs' broad claim that the statutory procedures lack due process for the failure to provide pre-deduction hearings. This claim I now find to be authoritatively settled at this point in time in favor of defendants, by the United States Supreme Court's dismissal of the appeal from Sanford v. Rockefeller, 35 N.Y.2d 547, 364 N.Y.S.2d 450 (1974), "for want of a substantial federal question" (Sanford v. Carey, 421 U.S. 973 (1975)), as noted in the

decision of our Court of Appeals in Cheeseman v. Carey, supra, 623 F.2d at 1390 n.5. Plaintiffs have alleged no purported distinctions between the present case and Sanford that were not addressed and rejected in Cheeseman. Thus summary judgment for defendants on the broader due process claim regarding the lack of pre-deduction hearings is also appropriate at this time.

In accordance with the views expressed herein, plaintiffs' motion for class certification is hereby ORDERED granted. It is further hereby ORDERED that plaintiffs' motion for summary judgment is denied and summary judgment for defendants is hereby ORDERED granted.

Dated: Buffalo, N. Y.
January 19, 1982

John T. Curtin
U.S.D.J.

United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of November one thousand nine hundred and eighty-two

Present:

HON. WILFRED FEINBERG, CH.J

HON. HENRY J. FRIENDLY

HON. IRVING R. KAUFMAN

Circuit Judges,

82-7173

GLORIA WOLKENSTEIN, KATHRYN SILKES, PHILIP RUMORE and VINCENT BOLA, individually and on behalf of themselves and others similarly situated,

Plaintiffs-Appellants,

v.

EUGENE T. REVILLE, individually and as Superintendent of schools; CLAUDE D. CLARK, individually and as Chief Fiscal Officer of the City of Buffalo Public School System, et al.,

Defendants-Appellees.

82-7173

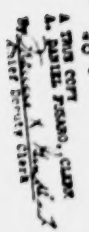
Appeal from the United States District Court for the Western District of New York

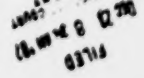
This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellants.

A. Daniel Fusaro, Clerk

by Edward J. Guardaro, Deputy Clerk





UNITED STATES COURT OF APPEALS

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A. DANIEL FUSARO
CLERK

[illegible]

Weinstein v. Neville
Docket No. 82-7173

August Term, 1982
Decided November 18, 1982

Page 308, line 2 - delete "Id." and insert "Id." in place thereof.

Page 313, line 5 - delete "Id." and insert "Id." in place thereof.

Page 316, line 6 - delete "210.3(h)" and insert "210.2(h)" in place thereof.

A. DANIEL FUSARO,
Clerk

AFF/hld

42 U.S.C. 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jursidiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

§ 201. Definitions

As used in this article:

1. The term "board" means the public employment relations board created by section two hundred five of this article.

2. The term "membership dues deduction" means the obligation or practice of a government to deduct from the salary of a public employee with his consent an amount for the payment of his membership dues in an employee organization. Such term also means the obligation or practice of a government to transmit the sums so deducted to an employee organization.

3. The term "chief legal officer" means (a) in the case of the state of New York or a state public authority, the attorney general of the state of New York, (b) in the case of a county, city, town, village or school district, the county attorney, corporation counsel, town attorney, village attorney or school district attorney, as the case may be, and (c) in the case of any such government not having its own attorney, or any other government or public employer, the corporation counsel of the city in which such government or public employer has its principal office, and if such principal office is not located in a city, the county attorney of the county in which such government or public employer has its principal office.

4. The term "terms and conditions of employment" means salaries, wages, hours and other terms and conditions of employment.

5. The term "employee organization" means an organization of any kind having as its primary purpose the improvement of terms and conditions of employment of public employees, except that such term shall not include an organization (a) membership in which is prohibited by section one hundred five of this chapter, (b) which discriminates with regard to the terms or conditions of membership because of race, color, creed or national origin, or (c) which, in the case of public employees who hold positions by appointment or employment in the service of the board and who are excluded from the application of this article by rules and regulations of the board, admits to membership or is affiliated directly or indirectly with an organization which admits to membership persons not in the service of the board, for purposes of any provision of this article other than sections two hundred ten and two hundred eleven of this article.

6. (a) The term "government" or "public employer" means (i) the state of New York, (ii) a county, city, town, village or

any other political subdivision or civil division of the state, (iii) a school district or any governmental entity operating a public school, college or university, (iv) a public improvement or special district, (v) a public authority, commission, or public benefit corporation, or (vi) any other public corporation, agency or instrumentality or unit of government which exercises governmental powers under the laws of the state.

(b) Upon the application of any government, the board may determine that the applicant shall be deemed to be a joint public employer of public employees in an employer-employee negotiating unit determined pursuant to section two hundred seven of this chapter when such determination would best effectuate the purposes of this chapter.

7. (a) The term "public employee" means any person holding a position by appointment or employment in the service of a public employer, except that such term shall not include for the purposes of any provision of this article other than sections two hundred ten and two hundred eleven of this article, persons holding positions by appointment or employment in the organized militia of the state and persons who may reasonably be designated from time to time as managerial or confidential upon application of the public employer to the appropriate board in accordance with procedures established pursuant to section two hundred five or two hundred twelve of this article, which procedures shall provide that any such designations made during a period of unchallenged representation pursuant to subdivision two of section two hundred eight of this chapter shall only become effective upon the termination of such period of unchallenged representation. Employees may be designated as managerial only if they are persons (i) who formulate policy or (ii) who may reasonably be required on behalf of the public employer to assist directly in the preparation for and conduct of collective negotiations or to have a major role in the administration of agreements or in personnel administration provided that such role is not of a routine or clerical nature and requires the exercise of independent judgment. Employees may be designated as confidential only if they are persons who assist and act in a confidential capacity to managerial employees described in clause (ii).

(b) For the purposes of this article, assistant attorneys general shall be designated managerial employees and confidential investigators employed in the department of law shall be designated confidential employees.

8. The term "state public authority" means a public benefit corporation or public corporation, a majority of the members of which are (i) appointed by the governor or by another state officer or body, (ii) designated as members by virtue of their state office, or (iii) appointed or designated by any combination of the foregoing.

9. The term "strike" means any strike or other concerted stoppage of work or slowdown by public employees.

10. The term "chief executive officer" in the case of school districts, means the superintendent of schools in school districts employing their own superintendents, and in school districts under the jurisdiction of a district superintendent of schools, shall mean the principal of the district.

11. The term "legislative body of the government," in the case of school districts, means the board of education, board of trustees or sole trustee, as the case may be.

12. The term "agreement" means the result of the exchange of mutual promises between the chief executive officer of a public employer and an employee organization which becomes a binding contract, for the period set forth therein, except as to any provisions therein which require approval by a legislative body, and as to those provisions, shall become binding when the appropriate legislative body gives its approval.

§210. Prohibition of strikes
1. No public employee or employee organization shall engage in a strike, and no public employee or employee organization shall cause, instigate, encourage, or condone a strike.
2. Violations and penalties; presumption; prohibition against consent to strike; determination; notice; probation; payroll deductions; objections; and restoration. (a) Violations and penalties. A public employee shall violate this subdivision by engaging in a strike or violating paragraph (c) of this subdivision and shall be liable as provided in this subdivision pursuant to the procedures contained herein. In addition, any public employee who violates subdivision one of this section may be subject to removal or other disciplinary action provided by law for misconduct.
(b) Presumption. For purposes of this subdivision an employee who is absent from work without permission, or who abstains wholly or in part from the full performance of his duties in his normal manner without permission, on the date or dates when a strike occurs, shall be presumed to have engaged in such strike on such date or dates.
(c) Prohibition against consent to strike. No person exercising on behalf of any public employer any authority, supervision or direction over any public employee shall have the power to authorize, approve, condone or consent to a strike, or the engaging in a strike, by one or more public employees, and such person shall not authorize approve, condone or consent to such strike or engagement.

(d) Determination. In the event that it appears that a violation of this subdivision may have occurred, the chief executive officer of the government involved shall, on the basis of such investigation and affidavits as he may deem appropriate, determine whether or not such violation has occurred and the date or dates of such violation. If the chief executive officer determines that such violation has occurred, he shall further determine, on the basis of such further investigation and affidavits as he may deem appropriate, the names of employees who committed such violation and the date or dates thereof. Such determination shall not be deemed to be final until the completion of the procedures provided for in this subdivision.

(e) Notice. The chief executive officer shall forthwith notify each employee that he has been found to have committed such violation the date or dates thereof and of his right to object to such determination pursuant to paragraph (h) of this subdivision; he shall also notify the chief fiscal officer of the names of all such employees and of the total number of days, or part thereof, on which it has been determined that such violation occurred. Notice to each employee shall be by personal service or by certified mail to his last address filed by him with his employer.

(g) Payroll deductions. Not earlier nor later than ninety days following the date of such determination, the chief fiscal officer of the government involved shall deduct from the compensation of each such public employee an amount equal to twice his daily rate of pay for

each day or part thereof that it was determined that he had violated this subdivision; such rate of pay to be computed as of the time of such violation. In computing such deduction, credit shall be allowed for amounts already withheld from such employee's compensation on account of his absence from work or other withholding of services on such day or days. In computing the aforesaid thirty to ninety day period of time following the determination of a violation purusant to subdivision (d) of paragraph two of this section and where the employee's annual compensation is paid over a period of time which is less than fifty-two weeks, that period of time between the last day of the last payroll period of the employment term in which the violation occurred and the first day of the first payroll period of the next succeeding employment term shall be disregarded and not counted.

(h) Objections and restoration. Any employee determined to have violated this subdivision may object to such determination by filing with the chief executive officer, (within twenty days of the date on which notice was served or mailed to him pursuant to paragraph (e) of this subdivision) his sworn affidavit, supported by available documentary proof, containing a short and plain statement of the facts upon which he relies to show that such determination was incorrect. Such affidavit shall be subject to the penalties of perjury. If the chief executive officer shall determine that the affidavit and supporting proof establishes that the employee did not violate this subdivision, he shall dismiss the objection and so

notify the employee. If the chief executive officer shall determine that the affidavit and supporting proof raises a question of fact which, if resolved in favor of the employee, would establish that the employee did not violate this subdivision, he shall appoint a hearing officer to determine whether in fact the employee did violate this subdivision after a hearing at which such employee shall bear the burden of proof. If the hearing officer shall determine that the employee failed to establish that he did not violate this subdivision, the chief exeuctive officer shall so notify the employee. If the chief executive officer sustains an objection or the hearing officer determines on a preponderance of the evidence that such employee did not violate this subdivision, the chief executive officer shall forthwith restore to the employee the tenure suspended pursuant to paragraph (f) of this subdivision, and notify the chief fiscal officer who shall thereupon cease all further deductions and refund any deductions previously made pursuant to this subdivision. The determinations provided in this paragraph shall be reviewable pursuant to article seventy-eight of the civil practice law and rules.

3. (a) An employee organization which is determined by the board to have violated the provisions of subdivision one of this section shall, in accordance with the provisions of this section lose the rights granted pursuant to the provisions of paragraph (b) of subdivision one of section two hundred eight of this chapter.

(b) In the event that it appears that a

violation of subdivision one of this section may have occurred, it shall be the duty of the chief executive officer of the public employer involved (i) forthwith to so notify the board and the chief legal officer of the government involved, and (ii) to provide the board and such chief legal officer with such facilities, assistance and data as will enable the board and such chief legal officer to carry out their duties under this section.

(c) In the event that it appears that a violation of subdivision one of this section may have occurred, the chief legal officer of the government involved, or the board on its own motion, shall forthwith institute proceedings before the board to determine whether such employee organization has violated the provisions of subdivision one of this section.

(d) Proceedings against an employee organization under this section shall be commenced by service upon it of a written notice, together with a copy of the charges. A copy of such notice and charges shall also be served, for their information, upon the appropriate government officials who recognize such employee organization and grant to it the rights accompanying such recognition. The employee organization shall have eight days within which to serve its written answer to such charges. The board's hearing shall be held promptly thereafter and at such hearing, the parties shall be permitted to be represented by counsel and to summon witnesses in their behalf. Compliance with the technical rules of evidence shall not be required.

(e) In determining whether an employee organization has violated subdivision one of this section, the board shall consider (i) whether the employee organization called the strike or tried to prevent it, and (ii) whether the employee organization made or was making good faith efforts to terminate the strike.

(f) If the board determines that an employee organization has violated the provisions of subdivision one of this section, the board shall order forfeiture of the rights granted pursuant to the provisions of paragraph (b) of subdivision one, and subdivision three of section two hundred eight of this chapter, for such specified period of time as the board shall determine, or, in the discretion of the board, for an indefinite period of time subject to restoration upon application, with notice to all interested parties, supported by proof of good faith compliance with the requirements of subdivision one of this section since the date of such violation, such proof to include, for example, the successful negotiation, without a violation of subdivision one of this section, of a contract covering the employees in the unit affected by such violation; provided, however, that where a fine imposed on an employee organization pursuant to subdivision two of section seven hundred fifty-one of the judiciary law remains wholly or partly unpaid, after the exhaustion of the cash and securities of the employee organization, the board shall direct that, notwithstanding such forfeiture, such membership dues deduction shall be continued to the

extent necessary to pay such fine and such public employer shall transmit such moneys to the court. In fixing the duration of the forfeiture, the board shall consider all the relevant facts and circumstances, including but not limited to: (i) the extent of any wilful defiance of subdivision one of this section (ii) the impact of the strike on the public health, safety, and welfare of the community and (iii) the financial resources of the employee organization; and the board may consider (i) the refusal of the employee organization or the appropriate public employer or the representative thereof, to submit to the mediation and fact-finding procedures provided in section two hundred nine and (ii) whether, if so alleged by the employee organization, the appropriate public employer or its representatives engaged in such acts of extreme provocation as to detract from the responsibility of the employee organization for the strike. In determining the financial resources of the employee organization, the board shall consider both the income and the assets of such employee organization. In the event membership dues are collected by the public employer as provided in paragraph (b) of subdivision one of section two hundred eight of this chapter, the books and records of such public employer shall be prima facie evidence of the amount so collected.

(g) An employee organization whose rights granted pursuant to the provisions of paragraph (b) of subdivision one, and subdivision three of section two hundred eight of this article have been ordered forfeited pursuant to this section may be granted such rights after the termination of such forfeiture only after

complying with the provisions of clause (b) of subdivision three of section two hundred seven of this article.

§ 2566. Powers and duties of superintendent of schools

The superintendent of schools of a city shall possess, subject to the by-laws of the board of education, the following powers and be charged with the following duties:

1. To be the chief executive officer of such board and the educational system, and to have a seat on the board of education and the right to speak on all matters before the board, but not to vote.

2. To enforce all provisions of law and all rules and regulations relating to the management of the schools and other educational, social and recreational activities under the direction of the board of education.

3. In a city having a population of one million or more, to exercise such administrative and ministerial powers of such board as may be delegated to him by regulation and by-laws of such board in such manner and with the same force and effect as if such powers were given to him by the provisions of the education law.

4. To prepare the content of each course of study authorized by the board of education. The content of each such course shall be submitted to the board of education for its approval and, when thus approved, the superintendent shall cause such courses of study to be used in the grades, classes and schools for which they are authorized.

5. To recommend suitable lists of textbooks to be used in the schools.

6. To have supervision and direction of associate, assistant, district and other superintendents, directors, supervisors, principals, teachers, lecturers, medical inspectors, nurses, auditors, attendance officers, janitors and other persons employed in the management of the schools or the other educational activities of the city authorized by this chapter and under the direction and management of the board of education; to transfer teachers from one school to another, or from one grade of the course of study to another grade in such course, and to report immediately such transfers to said board for its consideration and action; to report to said board of education violations of regulations and cases of insubordination, and to suspend an associate, assistant, district or other superintendent, director, supervisor, expert, principal, teacher or other employee until the next regular meeting of the board, when all facts relating to the case shall be submitted to the board for its consideration and action.

7. To have supervision and direction over the enforcement and observance of the courses of study, the examination and promotion of pupils, and over all other matters pertaining to playgrounds, medical inspection, recreation and social center work, libraries, lectures and all other educational activities and interest under the management, direction and control of the board of education.

8. To issue such licenses to teachers, principals, directors, school psychiatrists, school psychologists, school medical inspectors, school aurists, school psychiatric social workers, school social case workers, research assistants, teacher-clerks, school clerks, clerical assistants, industrial or trade helpers in vocational schools, school librarians, laboratory assistants, placement and investigation assistants, financial assistants, machine shop assistants, tool boys, and other members of the teaching and supervising staff as may be required under the by-laws and regulations of the board of education in cities in which such board requires its teachers to hold qualifications in addition to or in advance of the minimum qualifications required under this chapter. In a city having a board of examiners, such licenses shall be issued on the recommendation of such board. All such licenses issued prior to the first day of December, nineteen hundred thirty-four, and all appointments made or hereafter made pursuant to such licenses are hereby authorized and validated against any statutory provision, omission, or irregularity, provided the examination for such license was conducted by the board of examiners in accordance with the by-laws and regulations of the board of education, notwithstanding the invalidity of any such by-laws and regulations.

§ 7801. Nature of proceeding

Relief previously obtained by writs of certiorari to review, mandamus or prohibition shall be obtained in a proceeding under this article. Wherever in any statute reference is made to a writ or order of certiorari, mandamus or prohibition, such reference shall, so far as applicable, be deemed to refer to the proceeding authorized by this article. Except where otherwise provided by law, a proceeding under this article shall not be used to challenge a determination:

1. which is not final or can be adequately reviewed by appeal to a court or to some other body or officer or where the body or officer making the determination is expressly authorized by statute to rehear the matter upon the petitioner's application unless the determination to be reviewed was made upon a rehearing, or a rehearing has been denied, or the time within which the petitioner can procure a rehearing has elapsed; or

2. which was made in a civil action or criminal matter unless it is an order summarily punishing a contempt committed in the presence of the court. As amended L.1962, c. 318, § 25.

§ 7803. Questions raised

The only questions that may be raised in a proceeding under this article are:

1. whether the body or officer failed to perform a duty enjoined upon it by law; or

2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or

3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or

4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.

§ 3020-a. Hearing procedures and penalties

1. Filing of charges. All charges against a person enjoying the benefits of tenure as provided in subdivision three of section one thousand one hundred two, and sections two thousand five hundred nine, two thousand five hundred seventy-three, twenty-five hundred ninety-j, three thousand twelve, three thousand thirteen and three thousand fourteen of this law shall be in writing and filed with the clerk or secretary of the school district or employing board during the period between the actual opening and closing of the school year for which the employee is normally required to serve. Except as provided in subdivision eight of section two thousand five hundred seventy-three and subdivision seven of section twenty-five hundred ninety-j of this law, no charges under this section shall be brought more than three years after the occurrence of the alleged incompetency or misconduct, except when the charge is of misconduct constituting a crime when committed.

2. Disposition of charges. Upon receipt of the charges, the clerk or secretary of the school district or employing board shall immediately notify said board thereof. Within five days after receipt of charges, the employing board, in executive session, shall determine, by a vote of a majority of all the members of such board, whether probable cause exists. If such determination is affirmative, a written statement specifying the charges in detail, and outlining his rights under this section, shall be immediately forwarded to the accused employee by certified mail. The employee may be suspended pending a hearing on the charges and the final determination thereof. Within ten days of receipt of the statement of charges, the employee shall notify the clerk or secretary of the employing board whether he desires a hearing on the charges. The inexcused failure of the employee to notify the clerk or secretary of his desire for a hearing within ten days of the receipt of charges shall be deemed a waiver of the right to a hearing. Unless the employee has waived his right to a hearing within the allotted time, the clerk or secretary of the board shall, not later than the end of said ten-day period, notify the commissioner of education of the need for a hearing. If the employee waives his right to a hearing the employing board shall proceed, within fifteen days, by a vote of a majority of all the members of such board, to determine the case and fix the penalty or punishment, if any, to be imposed in accordance with subdivision four of this section.

3. Hearings.

a. Notice of hearing. Upon receipt of a request for a hearing in accordance with subdivision two of this section, the commissioner of education shall schedule a hearing, to be held in the local school district, or county seat, within twenty working days of his receipt of the request therefor, and immediately notify the employee and the employing board of the time and place thereof and the procedures to be followed in selecting a hearing panel.

b. Hearing panel members. For the purposes of this section the commissioner of education shall maintain a list of hearing panel members, composed of professional personnel without administrative or supervisory responsibility, professional personnel with administrative or supervisory responsibility, chief school administrators, members of employing boards and others, selected from lists of nominees submitted by statewide organizations representing teachers, school administrators and supervisors and the employing boards. Hearing panel members except the chairman of the panel shall be compensated at the rate of fifty dollars for each day of actual service plus necessary travel and subsistence expenses incurred in carrying out the duties of a panel member. The chairman of the panel shall be paid the normal and customary fee paid to him for services as an arbiter under the auspices of the American Arbitration Association.

c. Hearing procedures. The commissioner of education shall have the power to establish necessary rules and procedures for the conduct of hearings under this section. Such rules shall not require compliance with technical rules of evidence. All such hearings shall be held before a hearing panel composed of three members not resident, nor employed, in the territory under the jurisdiction of the employing board, selected in the following manner from the list maintained by the commissioner of education for such purpose and from a list supplied by the American Arbitration Association: one member shall be selected by the employee, and one member shall be selected by the employing board from the list maintained by the commissioner, and the third member shall be chosen by mutual agreement of the first two, or, if they fail to agree, by the commissioner of education, from the list supplied by the American Arbitration Association. Such third member shall be chairman of the panel.

Each such hearing shall be conducted by the chairman of the panel and shall be public or private at the discretion of the employee. The employee shall have a reasonable opportunity to defend himself and an opportunity to testify in his own behalf. Each party shall have the right to be represented by counsel, to subpoena witnesses, and to cross-examine witnesses. All testimony taken shall be under oath which the chairman of the panel is hereby authorized to administer. A competent stenographer, designated by the commissioner of education, shall keep and transcribe a record of the proceedings at each such hearing. A copy of the transcript of the hearing shall, upon request, be furnished without charge to the employee and the board of education involved.

4. Post hearing procedures. Within five days of the conclusion of a hearing held under this section, the commissioner of education shall forward a report of the hearing, including the findings and recommendations of the hearing panel and their recommendations as to penalty or punishment if one is warranted, to the employee and to the clerk or secretary of the employing board. Within thirty days of receipt of such hearing report the employing board shall implement the recommendations thereof, which shall include the penalty or punishment, if any, of a reprimand, a fine, suspension for a fixed time without pay or dismissal. If the employee is acquitted he shall be restored to his position with full pay for any period of suspension and the charges expunged from his record.

5. Appeal. Either the employee or the employing board may review the findings of the hearing panel either by appeal to the commissioner of education as provided for by article seven of this chapter, or by a special proceeding under article seventy-eight of the civil practice law and rules. The hearing panel's determination shall be deemed to be final for the purpose of such proceeding.

6. Notwithstanding any other provision of law to the contrary, a hearing panel member who is employed by a public school district or board of cooperative educational services shall be released from duty by such district or board for such period necessary to carry out the responsibilities of such panel member. Nothing contained in this subdivision shall be construed to diminish or impair any benefits to which such hearing panel member or his legal representative or beneficiaries would be otherwise entitled had such panel member not been released from duty in accordance with the provisions of this subdivision, provided, however, that such district or board may require such panel member to reimburse such district or board an amount equal to the daily compensation otherwise payable pursuant to this section.